90-985

No.——



IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAYNE BRAY, *et al.*,
Petitioners,

v.

ALEXANDRIA WOMEN'S HEALTH CLINIC, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do "women seeking abortions" constitute a valid class for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?

2. Is opposition to abortion *per se* discrimination against women for purposes of the "class animus" requirement of 42 U.S.C. § 1985(3)?

3. Do purely private actors who hinder access to an abortion facility violate a federal constitutional right to interstate travel merely because some patrons of the facility come from out of state?

4. Are respondents' claims under 42 U.S.C. § 1985(3) so insubstantial as to deprive the federal courts of subject matter jurisdiction?

5. Did the court of appeals err by sustaining an award of attorney's fees against petitioners?

PARTIES

The petitioners are as follows: Jayne Bray, Michael Bray, Clifford Gannett, Patrick Mahoney, Michael McMonagle, Randall Terry, and Operation Rescue.*

The petitioners were each defendants in the district court and appellants and cross-appellees in the court of appeals. The following were also named as defendants in the district court but were not parties in the court of appeals: Project Rescue, the D.C. Project, and Veterans Campaign for Life.

The respondents are as follows: Alexandria Women's Health Clinic, Commonwealth Women's Clinic, Gynecare Associates, Metro Medical Center, Inc., d/b/a Annandale Women's Center, Nova Women's Medical Center, Planned Parenthood of Metropolitan Washington, DC, Inc., Prince William Women's Clinic, National Organization for Women, Maryland National Organization for Women, Virginia National Organization for Women, and 51st State National Organization for Women.

The respondents were each plaintiffs in the district court and appellees and cross-appellants in the court of appeals. The following were also plaintiffs in the district court and cross-appellants in the court of appeals, but were not appellees in the court of appeals: Capitol Women's Center, Inc., Hillcrest Women's Surgi-Center, and Metropolitan Family Planning Institute. The following was also named as plaintiff in the district court but was not a party in the court of appeals: National Abortion Federation.

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* Pursuant to Rule 29.1, petitioners state that none of the petitioners is a corporation.

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DECISIONS BELOW

The decision of the district court is reported as *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989). The decision of the court of appeals is reported as *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit in this case was entered on September 19, 1990. This Court has jurisdiction, under 28 U.S.C. § 1254(1), to review the judgment of the court of appeals.

STATUTORY PROVISIONS

42 U.S.C. § 1985(3) provides as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1988 provides in pertinent part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title V of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

The underlying action in this case is a suit for declaratory and injunctive relief under federal and state law. Respondents—plaintiffs in the district court—are abortion facilities and organizations advocating a legal right to abortion. Petitioners—defendants in the district court—are six individuals and an organization opposed to abortion.

Respondents alleged that petitioners have engaged in illegal activities, and threaten to continue to do so, in order to stop abortions. There are, however, no allegations that petitioners have violated the injunction which the district court granted in the case at bar.

Respondents have asserted two federal causes of action: first, a conspiracy to violate a right to travel under 42 U.S.C. § 1985(3); and second, a conspiracy to violate a privacy right to abortion, also under § 1985(3). Respondents also asserted three pendent state causes of action: trespass, public nuisance, and tortious interference with business relationships. Federal jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331, 1342.

A. Statement of Facts

As the district court found, all of the petitioners "share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization." 726 F. Supp. at 1488 (App. 20a). The district court found that each of the individual defendants acted "through and in concert with Operation Rescue" to organize "rescue" events, *id.*, some of which included trespassing and obstruction of ingress and egress at abortion facilities, *id.* at 1489 (App. 21a).

The term "rescue" can refer to a variety of activities directed toward stopping abortion (i.e., *rescuing* the unborn child from abortion). The term includes not only

physical obstruction of access to abortion facilities, but also a variety of expressive activities protected under the free speech guarantee of the first amendment, such as picketing, distributing literature, and verbally seeking to persuade pregnant women entering abortion facilities to carry their children to term. Under this broad definition of "rescues," respondent Commonwealth Women's Clinic, in Falls Church, Virginia, has, as the district court found, been "on almost a weekly basis the target of 'rescue' demonstrations . . . ." 726 F. Supp. at 1489 (App. 22a).

The term "rescue" also can refer more particularly to efforts physically to block access to an abortion business. *Id.* at 1488 (App. 20a) (citing definition of "rescue" in Operation Rescue literature). In the narrow sense of an actual physical blockade, the district court found that a rescue had occurred, one year prior to the court's order granting an injunction against petitioners, at the Commonwealth Women's Clinic in Virginia. *Id.* at 1489 (App. 22a) (October 29, 1988). The court also found that rescues have occurred at a number of other locations outside of Virginia, *id.* at 1490 (App. 23a), including the Washington Metropolitan area, *id.* (April 1989 rescue in the District of Columbia); *id.* (recent rescues in the District of Columbia and Maryland).

The district court found there to be a "substantial likelihood" of blockades at abortion facilities in the Northern Virginia area "in the immediate future." *Id.* (App. 25a). There was no evidence, however, of "current plans for 'rescue' demonstrations at clinics in the Northern Virginia Area," *id.* (App. 24a), and the court's conclusion about the threat of future blockades rested entirely on an inference from the "established history" of blockades "in the Washington Metropolitan area and elsewhere," *id.* (App. 25a), together with the refusal of petitioners specifically "to report to the Court that 'rescue' demonstrations designed to close clinics would not be carried out against Northern Virginia clinics in the future," *id.*

The district court found that physical obstruction of abortion facilities hinders or prevents abortions from taking place at such facilities. *Id.* at 1489-90 (App. 21a-23a). The court also found that "[s]ubstantial numbers of women" seeking abortion in the Washington Metropolitan Area "travel interstate to reach the clinics." *Id.* at 1489 (App. 22a). In particular, the court found that "approximately twenty (20) to thirty (30) percent" of the patrons of the Commonwealth Women's Clinic in Virginia "come from out of state." *Id.*

The district court did not find, and respondents neither argued nor attempted to prove, that petitioners had any motivation for trying to stop abortions other than sincere opposition to the killing of unborn children. The district court also did not find, and respondents neither argued nor attempted to prove, that the place of residence of women coming to abortion facilities made any difference to petitioners' efforts to stop abortion; that petitioners discriminated in any way between women traveling interstate and women traveling intrastate; or that petitioners interfered with any "travel" other than access to a particular abortion facility. Finally, respondents' counsel conceded before trial that "we are not alleging and don't plan to prove State action, and we stand or fall on that." Trans. of Nov. 16, 1989 hearing (morning session) at 13.

B. Course of Proceedings

At the close of trial, the district court granted a permanent injunction.[1] The district court ruled in favor of

[1] The district court provided that the "permanent" injunction would expire on July 31, 1990, unless the plaintiffs were to show good cause for its extension. 726 F. Supp. at 1498 (App. 41a). The district court subsequently extended the injunction, which is currently set to expire on September 24, 1991. *See National Organi-*

respondents on their first federal claim (conspiracy to violate a right to travel), and on two of their pendent state claims (trespass and public nuisance). The court declined to address respondents' remaining federal claim (conspiracy to violate a right to abortion) and remaining state claim (tortious interference with business relationships). *National Organization for Women v. Operation Rescue*, 726 F. Supp. 1483, 1493-96 (E.D. Va. 1989) (App. 31a-36a).

The district court acknowledged the requirement, under § 1985(3), that the offending parties act with a "class-based discriminatory animus." 726 F. Supp. at 1492 (App. 28a). The district court held that "gender-based animus" satisfies this requirement. *Id.* The court further held the statute applicable on the facts of this case because "women seeking abortions" are a "subset of a gender-based class," *id.* at 1492-93 (App. 29a). The court recognized a conflict among the federal courts on this issue, *id.*, but found the "majority" view persuasive, *id.*

With respect to the requirement of an independently existing right secured under § 1985(3), the district court relied upon a federal constitutional right to travel. *Id.* at 1493 (App. 30a). The court held that because abortion businesses in Northern Virginia have clients "who travel from out of state," *id.*, blocking access to these businesses "interfere[s] with these person's [sic] right to unimpeded interstate travel," *id.* The court rejected petitioners' argument that such blockades "affect only intra-state travel, from the street to the doors of the clinics." *Id.*

The court also held that this "right to interstate travel is protected from purely private as well as governmental interference," and therefore no showing of state action was necessary. *Id.*

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zation for Women v. Operation Rescue, No. 89-1558-A, slip op. at 2, 5 (E.D. Va. Sept. 21, 1990) (App. 58a, 60a).

The district court declined to reach respondents' claim that petitioners were violating a constitutional right to abortion that is enforceable against purely private action. *Id.* at 1493-94 (App. 32a-33a). Observing that such a claim is "problematic" and "novel," the court held that it would be "unnecessary and imprudent to venture into this thicket." *Id.* at 1494 (App. 32a-33a).

Petitioners appealed to the United States Court of Appeals for the Fourth Circuit. Respondents cross-appealed, challenging certain limitations on the scope and duration of the injunction.

The district court subsequently awarded costs and attorneys fees to respondent. *National Organization for Women v. Operation Rescue*, No. 89-1558-A (E.D. Va. Feb. 13, 1990) (App. 43a). Petitioners appealed from this order as well, and the court of appeals consolidated this appeal with the previous appeal and cross-appeal.

The court of appeals affirmed the judgment of the district court in all respects (including denial of respondents' cross-appeal). *National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (per curiam) (App. 1a).

The court of appeals decided the case solely on the basis of the federal legal issues. *Id.* at 585-86 (App. 8a-9a). The court engaged in no independent analysis of the district court's rulings under § 1985(3). Rather, the court simply noted that the "legal premises under which the district court operated are . . . consistent with the law of the circuits." *Id.* at 585 (App. 8a). Announcing that it was reviewing the injunction under "an abuse of discretion standard," *id.*, the court of appeals held that the district court "operated in conformity with other circuits on the relevant questions of law," *id.* The court rested its disposition of the appeal specifically upon "the federal question raised by appellants [petitioners]," and therefore declined to address the propriety of pendent

jurisdiction over respondents' state claims. *Id.* at 586 (App. 9a). Finally, the court upheld the award of attorneys fees. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS.

The decision of the U.S. Court of Appeals for the Fourth Circuit in the present case is in direct conflict with a decision rendered by the U.S. Court of Appeals for the Fifth Circuit, and in effective conflict with a decision of the en banc U.S. Court of Appeals for the Eighth Circuit. The decision is also in direct conflict with a decision rendered by the U.S. District Court for the Central District of California, an appeal from which is now pending before the U.S. Court of Appeals for the Ninth Circuit.

The Fifth Circuit has twice rejected efforts to characterize anti-abortion activities as violative of 42 U.S.C. § 1985(3). *See Roe v. Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987); *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989).[2] In its most recent decision, the court of appeals held that anti-abortion activities do not satisfy the requirement of an "invidiously discriminatory class-based animus," *see United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825, 834-35 (1983), which this Court has held to be essential to a valid claim under § 1985(3). The lead opinion by Judge Gee in *Mississippi Women's Medical Clinic* observed that,

[2] In *Roe*, the court of appeals held that plaintiffs' claim of "class-based animus" failed because the asserted class—"persons who do do not share the anti-abortion religious beliefs of the conspirators," 811 F.2d at 932—was defective. *Id.* at 935-37. The *Roe* court observed that this class possessed "[n]o common unity of either religious denomination or faith," *id.* at 936.

even if female patrons of an abortion business were a class, there was no *animus* against that class.

> MWMC maintains . . . that the relevant "class" being discriminated against is that consisting of "women of childbearing age who seek medical attention from the MWMC." Assuming *arguendo* that this grouping constitutes a class, MWMC still has not shown that the protestors acted with an invidious discriminatory *animus* against that particular class. Rather, the record indicates that the protestors (who are made up of both men and women) confront and try to persuade to their point of view all groups—men, women of all ages, doctors, nurses, staff, the female security guards, etc. In fact, MWMC's introduction of [a] letter written to a male doctor indicates that the animus of the protestors is to dissuade *anyone* who contributes to the incidence of abortions. It is useful to reiterate that the legislative history indicates that Congress wanted to evaluate "class-based invidious discrimination" through the lens of "animus or motivation," not impact. *See United Brotherhood of Carpenters Local 610*, 463 U.S. at 834-35. Thus, . . . MWMC in this case has designated a class that is so under-inclusive as to mischaracterize the dispute.

Mississippi Women's Medical Clinic, 866 F.2d at 794. Judge Rubin, concurring in the result, agreed that plaintiffs had "failed to establish the existence of a 'class' against which the animus of the protestors was directed," *id.* at 797.

The decision of the Fourth Circuit in the present case, by contrast, holds that efforts to prevent abortion do satisfy the "class-based animus" requirement of § 1985(3).

The Eighth Circuit, in *Lewis v. Pearson Foundation, Inc.*, No. 88-1293 (8th Cir. Oct. 24, 1990) (en banc), affirmed, by an equally divided court, a district court decision rejecting a § 1985(3) claim against a pro-life crisis pregnancy center. *See also* 908 F.2d 318 (8th Cir. 1990) (origi-

nal panel decision reversing district court), *vacated*, No. 88-1293 (8th Cir. Sept. 7, 1990) (en banc). The plaintiff in *Lewis* had alleged an invidiously discriminatory animus against the class of "women seeking abortions." *See* 908 F.2d at 325. The district court had dismissed the complaint, finding a lack of animus and an improper class. *Id.* at 321. Citing the Fifth Circuit decision in *Roe v. Abortion Abolition Society*, the district court had held that because the "defendants acted out of moral-religious beliefs"—i.e., opposition to abortion—the complaint in *Lewis* "failed to establish the class-based discriminatory animus against which section 1985(3) was intended to protect." 908 F.2d at 321. The district court had also rejected the purported class—women seeking abortion—holding that this class "did not possess a unifying common characteristic distinguishing it from the remainder of the population." *Id.* The Eighth Circuit, upon rehearing the case en banc, affirmed the judgment of the district court by an equally divided court.[3] No. 88-1293 (8th Cir. Oct. 24, 1990) (en banc).

The decision of the Fourth Circuit in the present case, by contrast, holds that "women seeking abortion" form a valid class under § 1985(3) and that a desire to prevent women from obtaining abortions, without more, is equivalent to an invidiously discriminatory class animus.

The Central District of California has squarely rejected a § 1985(3) claim indistinguishable from the case at bar. In *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Cal. 1989), the district court held that the class of "women seeking abortion" does not satisfy the requirements of § 1985(3). 721 F. Supp. at 1171.

> The Court disagrees with the proposition that any "particular subclass of women," . . . is a protected class. For if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, because it separates persons of the same gender from each other and, obviously, on a basis other than by gender. The inquiry, thus, must be made without respect to gender, *i.e.*, it is the "seeking abortion" trait which animates the defendants' actions and must be the basis for making the § 1985(3) analysis.
>
> Such a class does not stand up to close analysis . . . . Although women, under certain circumstances, still have a constitutional right to seek an abortion, the courts have never designated "abortion seekers" as a class requiring special protection or subject to exacting scrutiny. And certainly Congress has never so indicated in legislation. The Supreme Court's recent summary of its abortion decisions since *Roe v. Wade*, 410 U.S. 113 (1973), cannot be read as suggesting that women seeking abortions is a suspect class subject to exacting scrutiny. *See Webster v. Reproductive Health Serv.*, 109 S. Ct. 3040, 3051-52 (1989). The Court holds that women seeking abortions is not a class intended to be protected by the Ku Klux Klan Act.

721 F. Supp. at 1171-72 (citation, brackets, and footnote omitted). The district court subsequently dismissed the plaintiffs' amended complaint. *National Abortion Federation v. Operation Rescue*, No. CV 89-1181 AWT (C.D. Cal. Jan. 31, 1990), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990). Adhering to its previous ruling, the court explicitly rejected the reasoning of the Second Circuit in *New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990), which held that efforts to prevent abortion "reveal an attitude or animus based on gender," *NY State NOW*, 886 F.2d at 1359. Refusing to follow the Second Circuit, the district court in *National Abortion Federa-*

[3] It should be noted that a senior judge participated in the en banc rehearing and voted to reverse. Thus, among active members of the Eighth Circuit, the vote was 5-4 in favor of affirmance.

tion declared itself "unable to make the leap from 'women seeking abortion' to 'women' . . . ." Slip. op. at 5.

The decision of the Fourth Circuit in the present case, by contrast, holds "women seeking abortion" to be a proper class under § 1985(3), and equates opposition to abortion with gender-based discrimination.

The plain conflict between the Fourth Circuit and the Fifth and Eighth Circuits (and the Central District of California) is only aggravated by the decisions of the Second Circuit and various district courts sustaining, with the Fourth Circuit, a cause of action under § 1985 (3) against private parties, like petitioners, who engage in activities designed to prevent abortion. *See infra* note 4. The appeals on this issue now pending in the Sixth and Ninth Circuits, *see id.*, cannot possibly resolve this conflict, and can only contribute to the division of the circuits.

In order to resolve this conflict in the circuits, therefore, this Court ought to grant review in the case at bar.

II. THE QUESTIONS PRESENTED ARE SUBSTANTIAL AND UNSETTLED.

The national controversy over the issue of human abortion has given rise to a multitude of local conflicts between opponents and providers of abortion. Opponents of abortion have employed a variety of strategies to discourage or prevent abortions. Abortion facilities have countered with a variety of lawsuits featuring various state and federal causes of action.

The present case involves the use of 42 U.S.C. § 1985 (3), the civil rights conspiracy law, as a means of invoking federal jurisdiction and obtaining relief against private persons who obstruct or threaten to obstruct access to abortion businesses.

A. Practical Importance

The questions presented by the application of § 1985 (3) to anti-abortion activists are of great practical importance to the federal judiciary. Cases alleging a cause of action under this statute, in the specific context of anti-abortion activities, have arisen in at least nine of the twelve federal geographical circuits.[4] Most of these cases are still pending.

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[4] As of December 17, 1990 petitioners are aware of the following cases:

D.C. Circuit—*National Organization for Women v. Operation Rescue*, 726 F. Supp. 300 (D.D.C. 1989), later decision, No. 89-2968-LFO (D.D.C. July 31, 1990).

1st Circuit—no known cases.

2d Circuit—*New York State NOW v. Terry*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); *Cousins v. Terry*, 721 F. Supp. 426 (N.D.N.Y. 1989); *Upper Hudson Planned Parenthood, Inc. v. Doe*, No. 90-CV-1084 (N.D.N.Y. filed Oct. 5, 1990).

3d Circuit—*Roe v. Operation Rescue*, 710 F. Supp. 577 (E.D. Pa. 1989).

4th Circuit—*National Organization for Women v. Operation Rescue*, 914 F.2d 582 (4th Cir. 1990) (per curiam); *National Organization for Women v. Operation Rescue*, No. 89-3038 (D. Md. Nov. 15, 1990).

5th Circuit—*Roe v. Abortion Abolition Society*, 811 F.2d 931 (5th Cir.), *cert. denied*, 484 U.S. 848 (1987); *Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788 (5th Cir. 1989).

6th Circuit—*Volunteer Medical Clinic, Inc. v. Operation Rescue*, No. Civ. 3-89-156 (E.D. Tenn. May 19, 1989), *appeal docketed*, No. 90-5159 (6th Cir. Jan. 30, 1990).

7th Circuit—*Fort Wayne Women's Health Organization v. Brane*, Civ. No. F90-066 (N.D. Ind. May 8, 1990).

8th Circuit—*Lewis v. Pearson Foundation, Inc.*, No. 87-894 C (2) (E.D. Mo. Jan. 15, 1988), *aff'd by an equally divided court*, No. 88-1293 (8th Cir. Oct. 24, 1990) (en banc); *Carhart v. Doolan*, No. CV 90-0-540 (D. Neb. filed Aug. 7, 1990).

9th Circuit—*Chico Feminist Women's Health Center v. Butte Glen Medical Society*, 557 F. Supp. 1190 (E.D. Cal. 1983); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 712 F. Supp. 165 (D. Ore. 1988); *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168 (C.D. Cal. 1989), *amended*

The proper disposition of these lawsuits, as well as the threshold jurisdictional question whether they belong in federal court at all, depends upon the validity of respondents' asserted cause of action under § 1985(3).

B. Intrinsic Importance

The questions presented by the application of § 1985(3) to anti-abortion activists are of great inherent legal significance as well.

This Court has clearly identified several basic elements of a claim under § 1985(3). *See United Brotherhood of Carpenters and Joiners of America v. Scott*, 463 U.S. 825 (1983); *Griffin v. Breckinridge*, 403 U.S. 88 (1971).[5] Two crucial tests for a § 1985(3) claim are especially relevant to the present case. First, plaintiffs must allege and prove an "invidiously discriminatory animus behind the conspirators' action." *Griffin*, 403 U.S.

complaint dismissed, No. CV 89-1181 (C.D. Cal. Jan. 31, 1990), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990); *Southwestern Medical Clinics of Nevada, Inc. v. Operation Rescue*, 744 F. Supp. 230 (D. Nev. 1989).

10th Circuit—no known cases.

11th Circuit—no known cases.

With the exception of the *Lewis* case in the Eighth Circuit, each of these cases involves a suit seeking relief against anti-abortion picketing or obstruction at abortion facilities. *Lewis* was an unsuccessful suit by a woman who alleged that a pro-life crisis pregnancy center wrongfully hindered her efforts to obtain an abortion.

[5] This Court has held that

> to make out a violation of § 1985(3), . . . the plaintiff must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Scott, 463 U.S. at 828-29.

at 102 (footnote omitted); *Scott*, 463 U.S. at 834-35. Second, plaintiffs must identify some independently existing right or rights which defendants allegedly have violated or threaten to violate. *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 (1979); *Scott*, 463 U.S. at 833.

1. *Class animus*

The first crucial question presented in this case is whether anti-abortion activities *per se* manifest a discriminatory class-based animus that is cognizable under § 1985(3).

The decision of the court of appeals in the case at bar rests upon two basic premises: first, that "women" or "women seeking abortion" are a proper class under § 1985(3), and second, that anti-abortion activities *per se* manifest a discriminatory animus against women. Each of these premises presents a substantial and unsettled question of federal law.

a. *Presence of a cognizable class*

This Court has held that "it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans." *United Brotherhood of Carpenters and Joiners v. Scott*, 463 U.S. at 836. In *Scott*, the Court "withheld judgment on the question whether § 1985(3), as enacted, went any farther than its central concern—combatting the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments." 463 U.S. at 837.

Lower federal courts have nevertheless proceeded to hold, in the present case and elsewhere, that women are a class protected under § 1985(3).[6] A number of courts

[6] *E.g.*, *New York State NOW v. Terry*, 886 F.2d 1339, 1358-59 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); *Novotny v. Great American Federal Savings & Loan Ass'n*, 584 F.2d 1235,

have held in particular that "women seeking abortions" are valid class under § 1985(3).[7] Other courts have held to the contrary.[8]

This Court has not yet settled the question whether § 1985(3) applies to sex discrimination. But even if women are a class protected under § 1985(3), an additional question remains: whether "women seeking abortion" form a valid class. As one district court held,

> if the animus is directed at a particular class of women, then, by definition, it is not directed at other classes of women or at women as a class. If that is so, then the discrimination cannot be gender-based, because it separates persons of the same gender from each other and, obviously, on a basis other than by gender.

National Abortion Federation v. Operation Rescue, 721 F. Supp. 1168, 1171 (C.D. Cal. 1989), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990). Description of the class as "women seeking abortion" cannot, by mere verbal legerdemain, convert opposition to abortion into sex discrimination.

b. *Presence of discriminatory animus*

The court of appeals in the case at bar made unjustifiable logical leap when it held that petitioners' opposition to abortion is the legal equivalent of discrimination against women.

Petitioners' true motivation is obvious: the desire to discourage or prevent abortions. Respondents have never attempted to prove that any of the petitioners harbored the least bit of hostility toward women. In fact, one of the petitioners *is* a woman; furthermore, it is common knowledge that countless women are involved in anti-abortion activities, including efforts to block access to abortion facilities.

The decision of the court of appeals in the present case, therefore, as well as the decisions of other courts that have applied § 1985(3) to anti-abortion activities, must rest on the premise that opposition to abortion is *per se* the legal equivalent of opposition to women. While this may be the sincere belief of some proponents of legalized abortion, it is by no means a self-evident legal proposition. On the contrary, such a charge of sex discrimination represents an affront to the sincerity of countless men *and* women—including judges, legislators, scholars, and a multitude of others—who regard human abortion as the killing of innocent persons.

Petitioners tried to stop women from having abortions, not because these women are *women*, but because peti-

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1241-44 (3d Cir. 1978) (en banc), *vacated on other grounds*, 442 U.S. 366 (1979). *But cf. Wilhelm v. Continental Title Co.*, 720 F.2d 1173, 1176-77 (10th Cir. 1983) (strongly suggesting that the reach of § 1985(3) is limited to racially motivated conspiracies), *cert. denied*, 465 U.S. 1103 (1984), quoted with approval in *Brown v. Reardon*, 770 F.2d 896, 907 (10th Cir. 1985). The Seventh Circuit is in internal conflict on this question. *Compare Grimes v. Smith*, 776 F.2d 1359, 1366 (7th Cir. 1985) (strongly suggesting that the reach of § 1985(3) is limited to racially motivated conspiracies), *with Volk v. Coler*, 814 F.2d 1422, 1434 (7th Cir. 1988) (§ 1985(3) applies to sex discrimination), *with Stevens v. Tillman*, 855 F.2d 394, 404 (7th Cir. 1988) (whether § 1985(3) applies beyond racially motivated conspiracies is an open question), *cert. denied*, 109 S. Ct. 1339 (1989).

[7] *E.g., Cousins v. Terry*, 721 F. Supp. 426, 430 (N.D.N.Y. 1989); *Roe v. Operation Rescue*, 710 F. Supp. 577, 581 (E.D. Pa. 1989); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 712 F. Supp. 165, 169 (D. Ore. 1988).

[8] *National Abortion Federation v. Operation Rescue*, 721 F. Supp. 1168, 1171-72 (C.D. Cal. 1989), *amended complaint dismissed*, No. CV 89-1181 (C.D. Cal. Jan. 31, 1990), *appeal pending*, No. 90-55199 (9th Cir. argued May 11, 1990); *Lewis v. Pearson Foundation, Inc.*, No. 87-894 C (2), slip op. at 7-10 (E.D. Mo. Jan. 15, 1988), *aff'd by an equally divided court*, No. 88-1293 (8th Cir. Oct. 24, 1990) (en banc).

tioners believe that *abortion* is an atrocity. As in *Mississipi Women's Medical Clinic*, the

> protestors (who are made up of both men and women) confront and try to persuade to their point of view all groups—men, women of all ages, doctors, nurses, staff, the female security guards, etc. In fact, [the record] indicates that the animus of the protestors is to dissuade *anyone* who contributes to the incidence of abortions. It is useful to reiterate that the legislative history indicates that Congress wanted to evaluate "class-based invidious discrimination" through the lens of "animus or motivation," not impact.

866 F.2d at 794 (opinion of Gee, J.) (emphasis in original) (citing *Scott*, 463 U.S. at 834-35). Thus, petitioners did not act with "a class-based animus, that is a prejudice against a group of persons or against a particular person *because of his membership in that group.*" *Roe v. Abortion Abolition Society*, 811 F.2d 931, 934 (5th Cir.) (emphasis added), *cert. denied*, 484 U.S. 848 (1987). *See* 726 F. Supp. at 1488 (App. 20a) (quoting affidavit of petitioner Terry).

In view of the growing number of lower court cases treating opposition to abortion as the *per se* equivalent of discrimination against women under § 1985(3), *see supra* note 4, this Court should grant review to settle this issue.

2. *Right to travel*

The decision of the court of appeals in the present case rests upon the premise that private parties violate a federal constitutional right to travel when they block access to an establishment that serves at least some people who come from out of state. *See* 914 F.2d at 585 (App. 8a); *see also* 726 F. Supp. at 1493 (App. 29a-30a).

The implications of this holding are astonishing. Virtually every business located in a city situated near a state border (e.g., New York, Philadelphia, Washington, D.C., Chicago, Cincinnati, Minneapolis, St. Louis, and so

forth), as well as every business located on a major interstate route or in the vicinity of a tourist site or commercial center, will serve out-of-state customers on a regular basis. According to the holding of the court below, any sit-in or mass picketing at such a business would be a federal constitutional violation.

This Court has never recognized such an all-encompassing right to travel.

True, this Court has held that there is a "constitutional right to travel from one State to another," *United States v. Guest*, 383 U.S. 745, 757 (1966); the Court has further held that this right applies against private as well as government interference, *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971).

The right to travel, however, is not an unlimited right to mere physical movement. Rather, it is a "right of free *interstate migration*," *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902 (1986) (plurality opinion) (emphasis added), or, as Justice O'Connor would characterize it, a right to freedom from impermissibly burdensome discrimination between state residents, *id.* at 920 (O'Connor, J., dissenting). There is no general federal constitutional tort of obstruction of public or private passage.

The right to interstate travel guarantees *equal* freedom to travel as between interstate and intrastate travelers. If the obstacle in question applies to *both* interstate and intrastate travelers, the right to interstate travel is not implicated.

> Where, for example, an interstate migrant loses his driver's license because the new State has a higher age requirement, a different constitutional question is presented. For in such a case, the new State's age requirement is not a *penalty* imposed solely because the newcomer is a new resident; instead, all residents, old and new, must be of a prescribed age to drive.

Dunn v. Blumstein, 405 U.S. 330, 342 n.12 (1972) (citation omitted; emphasis in original). Thus, in *Dunn* this Court struck down a one-year residency requirement for voting which "penalized those persons, *and only those persons*, who have gone from one jurisdiction to another during the qualifying time period." *Id.* at 338 (emphasis added).[9] But in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), by contrast, this Court sustained a single-family zoning restriction which was "not *aimed* at transients." *Id.* at 7 (emphasis added).

Petitioners' alleged obstruction of access to abortion businesses simply does not implicate the federal constitutional right to travel under any traditional understanding of that right. Such obstruction hinders all comers, whether from Virginia or from out-of-state. Respondents did not establish, and could not establish, that anti-abortion rescues block border passage, single out interstate travelers, or penalize out-of-state patrons because of their residence.[10] *Cf. Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 902, 903 (1986) (plurality opinion) (right to "interstate migration" implicated by action that "actually deters," has the "primary objective" of deterring, or uses a "classification which serves to penalize" *interstate* migration).

Notwithstanding the absence of favorable precedent on the issue in this Court, the court of appeals in the case at

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[9] The residency restriction at issue in *Doe v. Bolton*, 410 U.S. 179 (1973), forbade abortions for nonresidents of Georgia while allowing them for residents. *Id.* at 202. This restriction therefore effectuated *discrimination* against out-of-state patrons of abortion facilities, *id.* at 200, and this Court held that the law violated the Privileges and Immunities Clause of the Constitution, U.S. Const. art. IV, § 2, *see* 410 U.S. at 200.

[10] In fact, an *intrastate* traveler from the far end of Virginia will obviously face greater inconvenience from an anti-abortion blockade in Alexandria than will an *interstate* traveler who resides just minutes away in the District of Columbia.

bar held that respondents had made out a valid claim of violation of their members' and clients' right to travel. Nor is this ruling an isolated aberration. In a number of similar cases in other jurisdictions, federal courts have found the right to travel implicated by the prevention or hindrance of entry into an abortion business.[11]

Nor is this expansion of the federal constitutional right to travel confined to cases involving abortion protests. In *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990) (sustaining "anti-cruising" ordinance), the Third Circuit explicitly recognized a right of *intrastate* travel. And in *Spencer v. Casavilla*, 903 F.2d 171 (2d Cir. 1990) (sustaining a § 1985(3) claim for racially motivated violence), the Second Circuit held that this newly discovered right to intrastate travel applies against purely private actors.

While past decisions of this Court provide no warrant for this major expansion of the right to travel, no decision of this Court clearly forecloses this expansion. This Court should therefore grant review in the present case in order to settle this important question of federal law.

3. *Federal jurisdiction*

Petitioners believe that the § 1985(3) claims of respondents are so patently insubstantial as to be insufficient to confer subject matter jurisdiction upon a federal court. *Hagans v. Lavine*, 415 U.S. 528, 537-38 (1974).

The jurisdictional issue is of great importance because of the frequency with which § 1985(3) claims are employed as the basis for obtaining federal court adjudication over what are essentially trespass suits. *See* No. 89-1558-A, slip op. at 5, (E.D. Va. Feb. 13, 1990) (App. 46a-47a) (ruling of district court on attorney's fees)

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[11] *E.g., New York State NOW v. Terry*, 886 F.2d 1339, 1360-61 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 2206 (1990); *Roe v. Operation Rescue*, 710 F. Supp. 577, 582 (E.D. Pa. 1989); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 712 F. Supp. 165, 168 (D. Ore. 1988).

(present case "was, essentially, a simple trespass case only modestly complicated by an unsettled § 1985(3) issue").

The Second Circuit recently dismissed, for lack of subject matter jurisdiction, a hopelessly attenuated claim against anti-abortion activists under the federal RICO statute. *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990). The exceedingly strained § 1985 (3) claim of respondents merits the same treatment. Until this Court settles the issue, however, abortion providers will remain free to clog the federal courts with injunction and damage actions against anti-abortion activists.

C. Precedential Importance

The questions presented by the application of § 1985(3) to anti-abortion activists are of importance as well for the precedents they set for other social controversies. The decision of the court below binds only the petitioners. The principles the court embraced, however, set the standards for all future public protest.

If the alleged sit-ins of petitioners violate the federal constitutional right to travel, for example, then so did the lunch-counter and college campus sit-ins of the 1960's and 1970's, and so will the sit-ins of the 1990's and 2000's—whatever the particular social cause may be.

The definitions of "class" and "animus" employed in these cases will similarly affect future decisions in areas as diverse as campaigns against pornography, anti-nuclear protests, "animal rights" demonstrations, and anti-smoking initiatives.

In short, the jurisprudence established in these cases cannot be confined to the context of abortion protests. Careful application of the correct legal principles is important not only for petitioners, but for the participants in the social struggles of the future.

III. THE QUESTIONS PRESENTED ARE SHARPLY DEFINED AND NECESSARY TO THE RESOLUTION OF THIS CASE.

Finally, the petition for certiorari presents sharply defined federal legal issues, resolution of which is necessary to the final disposition of the present case. No adequate, independent state grounds support the judgment of the court of appeals.

First of all, the court of appeals addressed only the federal issues in the case. 914 F.2d at 585-86 (App. 8a-9a). Affirming the district court on federal grounds, the court of appeals did not discuss the merits of respondents' pendent state claims. *Id.* at 586 (App. 9a). Moreover, the court explicitly declined to reach petitioners' objection to the exercise of pendent jurisdiction over these claims. *Id.* Hence, the propriety of the exercise of pendent jurisdiction in the district court is not before this Court. Were this Court to reverse the judgment of the court of appeals, that court would then need to determine, on remand, whether pendent jurisdiction would be appropriate in light of the absence of any federal cause of action. At that point, dismissal of the state claims, without prejudice, could be in order. *See United Mine Workers v. Gibbs*, 383 U.S. 727 (1966).[12]

Second, resolution of the threshold question of federal subject matter jurisdiction (question number four of the present petition for certiorari) in favor of petitioners

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[12] The possibility that the court of appeals might ultimately reaffirm its original judgment on alternative grounds, not yet decided by that court, does not prevent review in this Court. *E.g.*, *Witters v. Washington Dep't of Services for the Blind*, 474 U.S. 481, 486 n.3, 489-90 & n.5 (1986) (reversing the judgment of the Washington Supreme Court and remanding for consideration of additional arguments of respondents); *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 811-13 (1985) (reversing the judgment of the court of appeals and remanding for consideration of additional arguments of respondents).

would necessitate reversal of the judgments of the lower courts and dismissal of all claims against petitioners. There can be no adequate alternative state grounds for upholding a decision rendered in the absence of subject matter jurisdiction. *Hagans v. Lavine*, 415 U.S. 528, 536-37, 543 (1974).

Third, resolution, in favor of petitioners, of the federal questions presented, would require reversal of the award of attorney's fees against petitioners. The courts of appeals, including the Fourth Circuit, are uniform in holding that where a plaintiff loses on a federal fee-generating claim, even while winning on a pendent state claim, no award of attorney's fees is available under 42 U.S.C. § 1988. *Bunting v. City of Columbia*, 639 F.2d 1090, 1095 (4th Cir. 1981); *Haywood v. Ball*, 634 F.2d 740, 743 (4th Cir. 1980); *McDonald v. Doe*, 748 F.2d 1055, 1056-57 (5th Cir. 1984) ("This circuit . . . has recently held that the plaintiff does not . . . prevail for fee purposes under 42 U.S.C. § 1988 when his constitutional claim is decided adversely to him even though he obtains recovery on a pendent state law claim, joining the other circuits that have considered the question and have unanimously reached the same conclusion") (footnotes and citations omitted) (and cases cited), *reh'g denied*, 753 F.2d 1075 (5th Cir. 1985); *Raley v. Fraser*, 747 F.2d 287, 290-92 (5th Cir. 1984); *Reel v. Arkansas Dep't of Correction*, 672 F.2d 693, 697-99 (8th Cir. 1982); *Curia Brothers & Co. v. Allen*, 672 F.2d 347, 357-58 (3d Cir. 1982); *Russo v. State of New York*, 672 F.2d 1014, 1022-23 (2d Cir. 1982).

The judgment of the court of appeals, in short, rests entirely and necessarily upon that court's resolution, in a manner adverse to petitioners, of the questions presented in the petition for certiorari.

CONCLUSION

For all of the foregoing reasons, therefore, this Court should grant the petition for certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case at bar.

Respectfully submitted,

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December 18, 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2606

NATIONAL ORGANIZATION FOR WOMEN; 51ST STATE NATIONAL ORGANIZATION FOR WOMEN; MARYLAND NATIONAL ORGANIZATION FOR WOMEN; PLANNED PARENTHOOD OF METROPOLITAN WASHINGTON, DC, INC.; COMMONWEALTH WOMEN'S CLINIC; NOVA WOMEN'S MEDICAL CENTER; PRINCE WILLIAM WOMEN'S CLINIC; GYNECARE ASSOCIATES; METRO MEDICAL CENTER, INC., d/b/a ANNANDALE WOMEN'S CENTER; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; ALEXANDRIA WOMEN'S HEALTH CLINIC,

Plaintiffs-Appellees,

and

NATIONAL ABORTION FEDERATION; CAPITOL WOMEN'S CENTER, INC.; HILLCREST WOMEN'S SURGI-CENTER; METROPOLITAN FAMILY PLANNING INSTITUTE,

Plaintiffs,

versus

OPERATION RESCUE; RANDALL TERRY; PATRICK MAHONEY; CLIFFORD GANNETT; MICHAEL MCMONAGLE; MICHAEL BRAY; JAYNE BRAY,

Defendants-Appellants,

and

PROJECT RESCUE; THE D.C. PROJECT; VETERANS CAMPAIGN FOR LIFE,

Defendants.

No. 90-2607

NATIONAL ORGANIZATION FOR WOMEN; 51ST STATE NATIONAL ORGANIZATION FOR WOMEN; MARYLAND NATIONAL ORGANIZATION FOR WOMEN; PLANNED PARENTHOOD OF METROPOLITAN WASHINGTON, DC, INC.; COMMONWEALTH WOMEN'S CLINIC; CAPITOL WOMEN'S CENTER, INC.; NOVA WOMEN'S MEDICAL CENTER; PRINCE WILLIAM WOMEN'S CLINIC; GYNECARE ASSOCIATES; METRO MEDICAL CENTER, INC., d/b/a ANNANDALE WOMEN'S CENTER; HILLCREST WOMEN'S SURGI-CENTER; METROPOLITAN FAMILY PLANNING INSTITUTE; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; ALEXANDRIA WOMEN'S HEALTH CLINIC,

Plaintiffs-Appellants,

and

NATIONAL ABORTION FEDERATION,

Plaintiff,

versus

OPERATION RESCUE; RANDALL TERRY; PATRICK MAHONEY; CLIFFORD GANNETT; MICHAEL MCMONAGLE; MICHAEL BRAY; JAYNE BRAY,

Defendants-Appellees,

and

PROJECT RESCUE; THE D.C. PROJECT; VETERANS CAMPAIGN FOR LIFE,

Defendants.

No. 90-2651

NATIONAL ORGANIZATION FOR WOMEN; 51ST STATE NATIONAL ORGANIZATION FOR WOMEN; MARYLAND NATIONAL ORGANIZATION FOR WOMEN; PLANNED PARENTHOOD OF METROPOLITAN WASHINGTON, DC, INC.; COMMONWEALTH WOMEN'S CLINIC; NOVA WOMEN'S MEDICAL CENTER; PRINCE WILLIAM WOMEN'S CLINIC; GYNECARE ASSOCIATES; METRO MEDICAL CENTER, INC., d/b/a ANNANDALE WOMEN'S CENTER; VIRGINIA NATIONAL ORGANIZATION FOR WOMEN; ALEXANDRIA WOMEN'S HEALTH CLINIC,

Plaintiffs-Appellees,

and

NATIONAL ABORTION FEDERATION; CAPITOL WOMEN'S CENTER, INC.; HILLCREST WOMEN'S SURGI-CENTER; METROPOLITAN FAMILY PLANNING INSTITUTE,

Plaintiffs,

versus

OPERATION RESCUE; RANDALL TERRY; PATRICK MAHONEY; CLIFFORD GANNETT; MICHAEL MCMONAGLE; MICHAEL BRAY; JAYNE BRAY,

Defendants-Appellants,

and

PROJECT RESCUE; THE D.C. PROJECT; VETERANS CAMPAIGN FOR LIFE,

Defendants.

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
T.S. Ellis, III, District Judge. (CA-89-1558-A)

Argued: July 18, 1990 Decided: September 19, 1990

Before CHAPMAN and WILKINSON, Circuit Judges, and J. F. ANDERSON, Jr., United States District Judge for the District of South Carolina, sitting by designation.

Affirmed by published per curiam opinion.

ARGUED: Jay Alan Sekulow, CHRISTIAN ADVOCATES SERVING EVANGELISM, Washington, D.C., for Appellants. John H. Schafer, COVINGTON & BURLING, Washington, D.C., for Appellees. ON BRIEF: Douglas W. Davis, James M. Henderson, Sr., CHRISTIAN ADVOCATES SERVING EVANGELISM, Washington, D.C.; Thomas Patrick Monaghan, C. Peter Thomas S. Cornell, Walter M. Weber, FREE SPEECH ADVOCATES, New Hope, Kentucky, for Appellants. Laurence J. Eisenstein, Richard H. Seamon, Pamela S. Passman, COVINGTON & BURLING, Washington, D.C.; Sarah E. Burns, Alison Wetherfield, NOW LEGAL DEFENSE AND EDUCATION FUND, Washington, D.C., for Appellees.

PER CURIAM:

This is an appeal of a permanent injunction entered against six individuals and Operation Rescue, an unin-

corporated association whose members oppose abortion and its legalization. The district court enjoined them, *inter alia*, from "trespassing on, blockading, impeding or obstructing access to or egress from" the premises of plaintiffs, facilities that provide abortions or abortion counseling. The court held that defendants' blockading of abortion facilities infringed the right to travel of women seeking to obtain abortions at clinics in the Washington metropolitan area, in violation of 42 U.S.C. § 1985(3), and certain of their rights under state law. *Nat'l Org. For Women (NOW) v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989). Operation Rescue and the six individual defendants appeal. NOW cross-appeals, along with nine abortion facilities and four other organizational plaintiffs. We reject both appeals and affirm the judgment of the district court.

I.

Plaintiffs are nine clinics in the Washington metropolitan area and Northern Virginia that provide various abortion-related services, and five organizations that seek to preserve a woman's right to obtain an abortion. Defendant Operation Rescue is an organization whose purpose is to prevent abortions and to oppose their legalization. One of the ways Operation Rescue seeks to effectuate these goals is to stage "rescue" demonstrations at abortion facilities. At these demonstrations, the participants "intentionally trespass on the clinic's premises for the purpose of blockading the clinic's entrances and exits, thereby effectively closing the clinic" and " 'rescu[ing]' . . . fetuses scheduled for abortion." 726 F. Supp. at 1487. The individual defendants are persons who oppose abortion and its legalization, and who seek to advance their views in part by "planning, organizing and participating in 'rescue' demonstrations under the banner and auspices of Operation Rescue." *Id.* at 1488.

On November 8, 1989, plaintiffs filed a motion for a temporary restraining order in United States District

Court for the Eastern District of Virginia, seeking to enjoin defendants from, among other things, physically impeding access to certain facilities that offer abortion and related services. The impetus for this action was defendants' alleged plans for meetings, rallies, and "rescue" demonstrations on November 10-12 and 18-20, 1989 in the Washington metropolitan area. No rescue activities took place in Northern Virginia during that period. However, clinics in Maryland and the District of Columbia were closed due to demonstrations on those dates.

The district court granted plaintiffs' motion for a temporary restraining order after an expedited hearing on November 8-9, 1989. The trial of the action on the merits and the hearing on the application for a preliminary injunction were consolidated and scheduled to be heard on November 16, 1989. After a two day trial in which plaintiffs presented testimony from nine witnesses and defendants elected to present no evidence, the district court granted the request for a permanent injunction. The court enjoined defendants from "trespassing on, blockading, impeding or obstructing access to or egress from the [listed] premises." *Id.* at 1497. The court refused on First Amendment grounds to extend the injunction to enjoin rescue activities that tend to "intimidate, harass or disturb patients or potential patients." *Id.*

The district court concluded that defendants' activities operated to deny to women seeking abortions and abortion-related services the right to travel interstate in search of medical services in violation of 42 U.S.C. § 1985(3). The court noted that the elements of cause of action under § 1985(3) are:

> "(i) conspiracy; (ii) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (iii) an act in furtherance of the conspiracy; (iv) whereby

> a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States."

Id. at 1492 (*quoting Griffiin v. Breckenridge*, 403 U.S. 88, 102-03 (1971)). The court held that defendants had violated § 1985(3) by entering into a conspiracy to deprive women, whom it found to be a protected class within the meaning of § 1985(3), of their constitutional right to travel. It reasoned, citing *Doe v. Bolton*, 410 U.S. 179 (1973), that the rescue demonstrations interfere with the right to travel because substantial numbers of women seeking the services of clinics in the Washington metropolitan area travel interstate to obtain these services.

The court further found that permanent injunctive relief was appropriate because: (i) there was no adequate remedy at law; (ii) the balance of equities favored plaintiffs; and (iii) the public interest was served by granting the injunction. The court found that women seeking abortions and counseling were likely to suffer irreparable physical and emotional harm as a result of defendants' blockading of abortion facilities. The court noted, for example, that some women require insertion of a pre-abortion laminaria to achieve cervical dilation. Women prevented from entering the clinics for timely removal of this device may risk bleeding, infection, or other possible serious complications, or may be forced to seek services elsewhere. Similarly, the court referenced testimony to the effect that preventing access to abortion clinics could cause clients to experience stress, anxiety, and mental harm. 726 F. Supp. at 1489. The court concluded that since plaintiffs' actions were lawful, although morally objectionable to defendants, the balance of equities weighed in favor of guaranteeing the public protection of the constitutional right to travel.

Operation Rescue now appeals, and the National Organization for Women cross-appeals the district court's refusal to extend the scope of the injunction.

II.

We have reviewed the record and the reasoning of the district court in granting the injunction. We affirm the judgment because the district court found that the activities of appellants in furtherance of their beliefs had crossed the line from persuasion into coercion and operated to deny the exercise of rights protected by law. *See* 726 F. Supp. at 1489, 1492-93. The legal premises under which the district court operated are also consistent with the law of the circuits. The court's holding that gender-based animus satisfies the "purpose" element of § 1985(3) has been forecast by this circuit in *Buschi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985) (animus against classes defined by "race, national origin and sex" meet requirement of class-based animus within meaning of 1985(3)). At least six circuits have so held. *See New York Nat'l Org. for Women (NOW) v. Terry*, 886 F.2d 1339, 1359 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 2206 (1990); *Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988); *Stathos v. Bowden*, 728 F.2d 15, 20 (1st Cir. 1984); *Novotny v. Great Am. Fed. Savings & Loan Ass'n*, 584 F.2d 1235, 1244 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979); *Life Ins. Co. of N. Am. v. Reichardt*, 591 F.2d 499, 505 (9th Cir. 1979); *Conroy v. Conroy*, 575 F.2d 175, 177 (8th Cir. 1978). *But cf. Mississippi Women's Medical Clinic v. McMillan*, 866 F.2d 788, 794 (5th Cir. 1989). The Second Circuit has held under similar facts that blocking access to medical services provided by abortion facilities which serve an interstate clientele violates the constitutional right to travel. *See New York NOW*, 886 F.2d at 1360-61.

Moreover, we review the entry, scope, and duration of an injunction under an abuse of discretion standard. *See Prendergast v. New York Tel. Co.*, 262 U.S. 43, 50-51 (1923). We find that the district court operated in conformity with other circuits on the relevant questions of law, and we are unable to conclude that the court abused

its discretion in entering an injunction of this scope and duration against the respective parties. Specifically, we reject the argument of Operation Rescue that there was insufficient evidence to grant relief against defendants Bray, McMonagle and Gannett. We also reject NOW's contention that the district court abused its discretion in limiting the injunction to Northern Virginia and in declining to extend the injunction indefinitely. In addition, we affirm the district court's refusal to broaden the scope of the injunction to include activities that tend to "intimidate, harass or disturb patients or potential patients" because to do so would risk enjoining activities clearly protected by the First Amendment. In addition to the actions enjoined by the district court, the members of Operation Rescue also sought, through verbal means, to persuade women not to seek the services of abortion clinics and to "impress upon members of society" the moral rightness and intensity of their opposition to abortion. 726 F. Supp. at 1488. The district court was within its discretion in declining to extend the injunction in a manner that would interfere with such expressive activity. In view of our disposition of the federal question raised by appellants we also decline to disturb the district court's refusal to dismiss the state law claims, and we uphold as well its award of costs and attorneys fees. The district court did not, and we do not, reach the question of whether § 1985(3) can encompass violations of a right to privacy.

Accordingly, the judgment of the district court is affirmed in all respects for the reasons stated in its opinion.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 89-1558-A

NATIONAL ORGANIZATION FOR WOMEN, 51st STATE NATIONAL ORGANIZATION FOR WOMEN, MARYLAND NATIONAL ORGANIZATION FOR WOMEN, VIRGINIA NATIONAL ORGANIZATION FOR WOMEN, PLANNED PARENTHOOD OF METROPOLITAN WASHINGTON, D.C., Inc., COMMONWEALTH WOMEN'S CLINIC, NOVA WOMEN'S MEDICAL CENTER, ALEXANDRIA WOMEN'S HEALTH CLINIC, PRINCE WILLIAM WOMEN'S CLINIC, GYNECARE ASSOCIATES, METRO MEDICAL CENTER, Inc. d/b/a ANNANDALE WOMEN'S CENTER, CAPITOL WOMEN'S CENTER, INC., HILLCREST WOMEN'S SURGI-CENTER, and METROPOLITAN FAMILY PLANNING INSTITUTE,

Plaintiffs,

v.

OPERATION RESCUE, RANDALL TERRY, PATRICK MAHONEY, CLIFFORD GANNETT, MICHAEL MCMONAGLE, MICHAEL BRAY, JANE BRAY,

Defendants.

PERMANENT INJUNCTION

[Filed Nov. 22, 1989]

This matter came before the Court for a hearing on the merits.[1] Pursuant to Rule 65(a)(2), Fed. R. Civ. P.,

[1] The Court earlier granted plaintiffs' motion for a Temporary Restraining Order ("TRO"). This Permanent Injunction supersedes that Order.

and with the parties' consent, the merits hearing was accelerated and consolidated with the hearing for a preliminary injunction. At the conclusion of the hearing, the Court, pursuant to Rule 52, Fed. R. Civ. P., stated its findings of fact and conclusions of law from the bench. The Court will also issue Findings of Fact and Conclusions of Law in written, amplified form. Based on the findings and conclusions issued from the bench and on the forthcoming written Findings of Fact and Conclusions of Law, the Court ADJUDGES, ORDERS and DECREES that:

(1) The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys, and any persons acting in active concert or participation with it who receive actual notice of this Permanent Injunction, by personal service or otherwise, are ENJOINED and RESTRAINED from, in any manner or by any means, trespassing on, blockading, impeding or obstructing access to or egress from the following premises: Alexandria Women's Health Center, 101 South Whiting Street, Alexandria, Virginia; Commonwealth Women's Clinic, 916 West Broad Street, Falls Church, Virginia; Gynecare Associates, 312 South Washington Street, Alexandria, Virginia; Metro Medical Center, Inc. d/b/a Annandale Women's Center, 2871 Duke Street, Alexandria, Virginia; NOVA Women's Medical Center, 990 Main Street, Suite 305, Fairfax, Virginia; Planned Parenthood of Metropolitan Washington, D.C., Inc., 5622 Columbia Pike, Suite 303, Falls Church, Virginia; Planned Parenthood of Metropolitan Washington, D.C., Inc., 10875 Main Street, Suite 208, Fairfax, Virginia; Prince William Women's Clinic, 9384-C Forestwood Lane, Manassas, Virginia.

(2) The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys, and any persons acting in active concert or participation with it who receive actual notice

of this Permanent Injunction, by personal service or otherwise, are ENJOINED and RESTRAINED from, in any manner or by any means, trespassing on, blockading, impeding or obstructing access to or egress from any facility at which abortions, family planning or gynecological services are provided in Arlington County, Fairfax County, City of Fairfax, City of Falls Church, Loudoun County, Prince William County or the City of Alexandria.

(3) The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys, and any persons acting in active concert with it are directed to inform all persons who assemble to participate in a "rescue" operation [2] or similar event in concert with the defendants in the localities listed above in paragraph 2, of this Permanent Injunction and its terms. In the event of a "rescue" operation or similar event within the area covered by this permanent injunction, defendants are directed to file with the Court and serve upon the counsel for plaintiffs an affidavit establishing compliance with this paragraph and describing with particularity the means by which compliance was achieved. This affidavit is to be filed and served within three (3) days of the "rescue" operation or similar event.

(4) The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys or any persons acting in active concert or participation with it who receive actual notice of this Permanent Injunction by personal service or otherwise and who violate the provisions of this Permanent Injunction and are held in contempt of court, may be imprisoned and fined $1,500. The Court may impose greater or lesser fines in the event of aggravating, mitigating or extenuating circumstances.

(5) This Permanent Injunction terminates at 5:00 p.m., July 31, 1990 but may be extended for good cause shown.

(6) Plaintiffs are directed to deliver a copy of this Permanent Injunction to all of the police departments in each of the localities listed in paragraph 2.

Nothing in this Permanent Injunction should be construed to limit defendants' free exercise of their First Amendment rights. More specifically, nothing in this Permanent Injunction limits defendants' First Amendment right to express their views on abortion publicly and in a proper manner in the vicinity of any facility. But defendants may not use the First Amendment as an excuse to violate plaintiffs' rights.

The Clerk is directed to issue copies of this Permanent Injunction to all counsel of record.

/s/ T. S. Ellis III
T. S. Ellis III
United States District Judge

Alexandria, Virginia
November 22, 1989

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[2] "Rescue operation," as used here, means any activity that trespasses on, blockades, impedes or obstructs access to or egress from facilities at which abortions, family planning counseling or gynecological services are provided. Similarly, Operation Rescue has defined "rescues" as "heroic attempts by God-fearing people to save babies and mothers from abortion on a *particular day*, by *peacefully*, but *physically* blockading abortion mills with their bodies, to intervene between abortionists and the innocent victims." Operation Rescue, National Day of Rescue—October 29, 1988 (emphasis in original).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 89-1558-A

NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Plaintiffs,

v.

OPERATION RESCUE, *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed Dec. 6, 1989]

This matter comes before the Court on Plaintiffs' Application for a Permanent Injunction to enjoin defendants, *inter alia*, from trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from, any facility in the Washington Metropolitan area that offers and provides legal abortion services and related medical and psychological counselling.

The Court sets forth here its findings of fact and conclusion of law, pursuant to Rule 52(a), Fed. R. Civ. P.

Proceedings to Date

1. This cause first came before the Court on November 8, 1989 on plaintiffs' motion for a Temporary Restraining Order ("TRO") enjoining defendants from, *inter alia*, physically impeding access to, and egress from, premises that offer and provide legal abortion services and related medical and psychological counselling. Plaintiffs moved for an expedited hearing on this matter. The Court

heard oral argument on the TRO on November 8 and 9, 1989. Plaintiffs appeared by counsel. Defendants, having received actual notice of the proceeding, as well as copies of plaintiffs' pleadings, also appeared by counsel. Defendants' counsel accepted service of plaintiffs' complaint and related papers. At the conclusion of the hearing, the Court, having made the requisite findings, issued the TRO.

2. Following the entry of the TRO, the Court, with the parties' consent, and pursuant to Rule 65(a)(2), Fed. R. Civ. P., ordered the trial of the action on the merits to be advanced and consolidated with the hearing on the application for a preliminary injunction. The consolidated and expedited merits trial was set for November 16, 1989.

3. As scheduled, the merits trial of this action commenced on November 16, 1989, lasted two (2) days and ended on November 20, 1989.[1] Plaintiffs presented oral testimony from nine (9) witnesses and introduced documentary evidence. Plaintiffs' witnesses were:

—Nancy Dickinson-Collins, registered nurse and Director of the Commonwealth Women's Clinic, Falls Church, Virginia;

—Dr. Eugene W. Williams, Jr., obstetrician-gynecologist and Medical Director of Planned Parenthood of Metropolitan Washington ("PPMW"), Washington, D.C.;

—Patricia Ireland, Vice President of the National Organization of Women "(NOW") and Director of NOW's Project Stand Up for Women.

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[1] The 10-day Temporary Restraining Order was originally scheduled to expire at 4:00 pm on Saturday, November 18, 1989. Because the trial on the merits would not be completed prior to this time, the Court, for good cause shown and pursuant to Rule 65(b), Fed. R. Civ. P., extended the TRO for an additional 10 days. The permanent injunction, superseding the TRO, was entered on November 22, 1989.

—Lieutenant Gregory D. King, Police Officer, City of Falls Chuch and Commander of Uniform Patrol, Falls Church, Virginia;

—Kirsten Johnson, General Project Staff, NOW, Washington, D.C.;

—John Alan Bates, Jr., Volunteer, NOW, Washington, D.C. and Employee, Buyers Up/Public Citizen Consumer Group, Washington, D.C.;

—Barbara Lofton, Ph.D., Clinical Administrator for Hillview Women's Surgical Center, Forestville, Maryland;

—Jessica Sutin, Administrative Manager, PPMW, Washington, D.C.; and

—Allen Turnbull, retired citizen and resident of Bowie, Maryland.

Admitted as record evidence in this case were Plaintiffs' Exhibits # 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17 and 18.

4. Defendants elected to present no evidence.

5. At the conclusion of the trial the Court stated its findings and conclusions from the bench and granted the request for a permanent injunction. These written findings of fact and conclusions of law supplement those issued from the bench.

Parties

6. Plaintiffs are nine (9) clinics ("clinic plaintiffs") that, *inter alia*, provide abortions or abortion counselling and five (5) organizations "organizational plaintiffs") that, *inter alia*, seek to establish and preserve women's rights to obtain abortions.

7. Organizational plaintiffs, National Organization for Women, 51st State National Organization for Women,

Maryland National Organization for Women, Virginia National Organization for Women and Planned Parenthood of Metropolitan Washington, D.C., Inc. are membership organizations. They sue on behalf of themselves and their members, who include women who may wish to use abortion and family planning clinics in the Eastern District of Virginia and elsewhere.

8. The Court dismissed the National Abortion Federation as a plaintiff in this action. Counsel for plaintiffs offered no evidence identifying this entity or establishing any cause of action it might have.

9. Clinic plaintiffs provide abortions services and related medical and psychological counselling to residents of the Washington Metropolitan area [2] and elsewhere. They are:

District of Columbia Clinics

—Capitol Women's Clinic, Inc., 1339 22nd Street, N.W.

—Hillcrest Women's Surgi-Center, 7603 Georgia Avenue, N.W.

Maryland Clinics

—Metropolitan Family Planning Institute, 5915 Greenbelt Road, College Park

Virginia Clinics

—Alexandria Women's Health Center, 101 South Whiting Street, Alexandria

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[2] The Washington Metropolitan area encompasses the District of Columbia, Prince Georges County and Montgomery County in Maryland and Arlington County, Fairfax County, City of Fairfax, City of Falls Church, Loudon County, Prince William County, and the City of Alexandria in Virginia. The Virginia localities are collectively referred to throughout as "Northern Virginia."

—Commonwealth Women's Clinic, 916 West Broad Street, Falls Church

—Gynecare Associates, 312 South Washington Street, Alexandria

—Metro Medical Center, Inc., d/b/a Annandale Women's Center, 2871 Duke Street, Alexandria.

—NOVA Women's Medical Center, 9900 Main Street, Suite 305, Fairfax

—Planned Parenthood of Metropolitan Washington, D.C., Inc., 5622 Columbia Pike, Suite 303, Falls Church

—Planned Parenthood of Metropolitan Washington, D.C., Inc., 10875 Main Street, Suite 208, Fairfax

—Prince William Women's Clinic, 9384-C Forestwood Lane, Manassas

10. Defendants include one (1) organization and six (6) individuals opposed to abortion and its legalization.

11. Defendant Operation Rescue is an unincorporated association whose members oppose abortion and its legalization. Its principal goals are to stop abortion and to end its legalization. Among the activities it pursues to achieve these goals are demonstrations it terms "rescues." In general, a "rescue" is a demonstration at the site of a clinic where abortions are performed. At a "rescue," the demonstrators, called "rescuers," intentionally trespass on the clinic's premises for the purpose of blockading the clinic's entrances and exits, thereby effectively closing the clinic. In so doing, "rescuers" view their blockading efforts as "rescues" of fetuses scheduled for abortion.

12. Project Rescue, The D.C. Project and The Veterans Campaign for Life were named as defendants in the amended complaint. But as reflected in the evidence, and confirmed by plaintiffs' counsel, none is a legal entity capable of being sued; rather they are names of events organized and coordinated by Operation Rescue for the

purpose of conducting "rescues" at abortion facilities in the Washington Metropolitan area. Because Project Rescue, The D.C. Project and The Veterans Campaign for Life are not legal entities, they are deleted as defendants.

13. The individual defendants are persons who are opposed to abortion and its legalization and who are deeply committed to taking active steps to advance their views, including planning, organizing and participating in "rescue" demonstrations under the banner and auspices of Operation Rescue. The individual defendants are:

—Randall Terry, National Director and Founder of Operation Rescue. Terry is currently incarcerated in the Fulton County Correctional Facility, Fulton County, Georgia. The record reflects that Terry has played, and continues to play, a leading role in organizing and coordinating "rescues" and disruptions of abortion and family planning facilities in the Washington Metropolitan area.

—Patrick Mahoney, retained Consultant to Operation Rescue. Mahoney organizes and coordinates "rescues" and related activities in the Washington Metropolitan Area for Operation Rescue. Mahoney was present at, and participated in, "rescues" organized and performed by Operation Rescue on November 17 and 18, 1989 in the Washington Metropolitan area.

—Clifford Gannett, Director of Project Rescue. Gannett organizes and coordinates "rescues" and related activities in the Washington Metropolitan area.

—Michael McMonagle organizes and coordinates "rescues" and related activities for Operation Rescue in the Washington Metropolitan area.

—Michael Bray and Jayne Bray organize and coordinate "rescues" and related activities for Operation Rescue in the Washington Metropolitan area. Jayne Bray was arrested by Lieutenant Gregory D. King of the Falls Church,

Virginia Police Department for her activities at a "rescue" demonstration at the Commonwealth Women's Clinic in Falls Church, Virginia on October 29, 1988.

Facts

14. It is indisputable that all defendants share a deep commitment to the goals of stopping the practice of abortion and reversing its legalization. To achieve these goals, it appears from the record that the individual defendants have agreed and combined with one another and with defendant Operation Rescue to organize, coordinate and participate in "rescue" demonstrations at abortion clinics in various part of the country, including the Washington Metropolitan area. The purpose of these "rescue" demonstrations is to disrupt operations at the target clinic and indeed ultimately to cause the clinic to cease operations entirely. No one has put this point any better than defendant Terry, who in an affidavit, states that "while the child-killing facility is blockaded, no one is permitted to enter past the rescuers . . . Doctors, nurses, patients, staff, abortion-bound women, families of abortion-bound women —all are prevented from entering the abortuary while the rescue is in progress." Operation Rescue's literature defines "rescues" as "*physically* blockading abortion mills with [human] bodies, to intervene between abortionists and the innocent victims." *Operation Rescue, National Day of Rescue—October 29, 1988* (1988) (emphasis in original). By disrupting and blockading family planning and abortion clinics, defendants and their followers hope (i) to prevent abortions, (ii) to dissuade women from seeking a clinic's abortion services and (iii) to impress upon members of society the moral righteousness and intensity of their anti-abortion views.

15. The individual defendants, acting through and in concert with Operation Rescue, have organized "rescue" events under the names D.C. Project, Project Rescue and Veterans' Campaign for Life. These "rescue" events focused on abortion clinics in the Washington Metropolitan area and the record is replete with references confirming the individual defendants' involvement in these events. For example, defendant Gannett is the Executive Director of Project Rescue and defendants Mahoney, McMonagle and Michael Bray have assisted Operation Rescue in the organization and coordination of the District of Columbia Project and Project Rescue. Defendant Terry agreed to address an October 6, 1989 Project Rescue rally organized by defendant Gannett.

16. Because "rescuers" trespass on to clinic property and physically block ingress into and egress from the clinic, existing and prospective patients, as well as physicians and medical staff are unable to enter the clinic to render or receive medical or counselling services. This creates a substantial risk that existing or prospective patients may suffer physical or mental harm. Trial witnesses, in uncontradicted testimony, convincingly illustrated this point. For example, for some women who elect to undergo an abortion, clinic medical personnel prescribe and insert a pre-abortion laminaria to achieve cervical dilation. In these instances, timely removal of the laminaria is necessary to avoid infection, bleeding and other potentially serious complications. If a "rescue" demonstration closes a clinic, patients requiring the laminaria removal procedure or other vital medical services must either postpone the required treatment and assume the attendant risks or seek the services elsewhere. Uncontradicted trial testimony established that there were numerous economic and psychological barriers to obtaining these services elsewhere.[3] Hence, a "rescue" demonstra-

[3] Indigent or impecunious patients at some clinics receive abortion services for a nominal fee or free. Hospitals and other health care facilities often require insurance or full reimbursement for any services rendered. This makes it difficult, if not impossible, for indigent patients to obtain necessary services from other facilities when a "rescue" demonstration closes a clinic.

tion creates a substantial risk that a clinic's patients may suffer physical and mental harm.

17. Uncontradicted trial testimony by Dickinson-Collins, a trained mental health professional, established that blockading clinics and preventing patient access could cause stress, anxiety and mental harm (i) to women with abortions scheduled for that time, (ii) to women with abortion procedures (i.e., laminaria insertion) already underway and (iii) to women seeking counselling concerning the abortion decision.

18. Substantial numbers of women seeking the services of clinics in the Washington Metropolitan area travel interstate to reach the clinics. For example, approximately twenty (20) to thirty (30) percent of patients served at the Commonwealth Women's Clinic in Falls Church, Virginia come from out of state. Records for these patients reflect permanent residence addresses in Maryland, the District of Columbia, Pennsylvania, Texas, West Virginia, New Jersey, New York, and Florida. And at the Hillview Women's Center in Forestville, Maryland, a majority of the patients travel from out of state to obtain abortion services at the clinic. "Rescue" demonstrations, by blocking access to clinics, therefore have the effect of obstructing and interfering with the interstate travel of these women.

19. Defendants' use of "rescue" demonstrations as an anti-abortion protest is not a recent phenomenon. For example, on almost a weekly basis for the last five (5) years, Commonwealth Women's Clinic has been the target of "rescue" demonstrations by Operation Rescue. One of the largest of these occurred on October 29, 1988. That "rescue" succeeded in closing the Clinic from 7:00 a.m. to 1:30 p.m., notwithstanding the efforts of the Falls Church Police Department.[4] "Rescuers" did more than

[4] Trial testimony disclosed that the Falls Church Police Department consists of thirty (30) deputized officers. Typical of most

trespass on to the clinic's property and physically block all entrances and exists. They also defaced clinic signs, damaged fences and blocked ingress into and egress from the Clinic's parking lot by parking a car in the center of the parking lot entrance and deflating its tires. On this and other occasions, "rescuers" have strewn nails on the parking lots and public streets abutting the clinics to prevent the passage of any cars. Less than a year later, in April 1989, a similar "rescue" demonstration closed the Metropolitan Family Planning Institute in the District of Columbia for approximately four (4) hours.

20. More recently, defendants organized and planned a series of meetings, rallies and "rescues" in the Washington Metropolitan area for the weekends of November 10-12 and 18-20, 1989. These events were the impetus for plaintiffs' filing of this action. Although no Virginia clinics were "rescue" targets, several clinics elsewhere in the Washington Metropolitan area were subjected to "rescue" demonstrations. Clinics in Maryland and the District of Columbia were closed as a result of "rescues" on November 10, 11 and 12, 1989. The following weekend, on November 18, 1989, the Hillcrest Women's Surgi-Center in the District of Columbia was closed for eleven (11) hours as a result of a "rescue" demonstration. Five (5) women who had earlier commenced the abortion process at the clinic by having laminaria inserted were prevented by "rescuers" from entering the clinic to undergo timely laminaria removal.

21. Defendants use of "rescue" demonstrations as an anti-abortion protest is also widespread geographically.

"rescue" demonstrations, the rescuers outnumbered the Falls Church police officers on the scene that day. Even though 240 rescuers were arrested, the police were unable to prevent the closing of the clinic for more than six (6) hours. Limited police department resources combined with the typical absence of any advance notice identifying a target clinic renders it difficult for local police to prevent rescuers from closing a facility for some period of time.

"Rescues" have taken place in many places across the country and have been enjoined in New York [5], Pennsylvania [6], Washington [7], Connecticut [8], and California,[9] as well as the Washington Metropolitan area. Recent "rescue" demonstrations in the District of Columbia and Maryland were carried out in violation of federal injunctions.[10]

22. Defendants show no signs of abandoning "rescue" demonstrations as a means of expressing their intense and deeply felt objection to abortion and its legalization. Counsel for defendants advised the Court that they know of no current plans for "rescue" demonstrations at clinics in the Northern Virginia Area. At the same time, however, defendants' counsel declined to offer the Court any assurance that such "rescue" demonstrations would not be planned and carried out in the future. Moreover, defendants' counsel also declined to report to the Court on behalf of the defendants that Operation Rescue would undertake to direct its membership to refrain from conducting "rescue" demonstrations at Northern Virginia clinics.

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[5] *Cousins v. Terry*, 721 F. Supp. 426 (N.D.N.Y. 1989); *New York State Nat'l Org. for Women v. Operation Rescue*, 704 F. Supp. 1247 (S.D.N.Y. 1989).

[6] *Roe v. Operation Rescue*, 710 F. Supp. 577 (E.D. Pa. 1989); *Northeast Women's Center v. McMonagle*, 665 F. Supp. 1147 (E.D. Pa. 1987).

[7] *Aradia Women's Health Center v. Operation Rescue*, No. 88-1539 R (W.D. Wash. July 7, 1989).

[8] *Town of West Hartford v. Operation Rescue*, No. H-89-400 (D.Ct. Sept. 20, 1989).

[9] *National Abortion Fed'n v. Operation Rescue*, No. CV 89-1181 (C.D. Cal. March 15, 1989).

[10] *National Org. for Women v. Operation Rescue*, 1989 W.L. 136639 (D.D.C. 1989); *National Org. for Women v. Operation Rescue*, No. 89-3038 (D.Md. Nov. 9, 1989).

23. Defendants well established history of raising and carrying out "rescue" demonstrations in the Washington Metropolitan area and elsewhere, together with their refusal to report to the Court that "rescue" demonstrations designed to close clinics would not be carried out against Northern Virginia clinics in the future, compelled this Court to conclude that there is a substantial likelihood defendants will seek to carry out "rescue" demonstrations in Northern Virginia in the immediate future. The Court also concludes that unless the threatened and unlawful acts to those clinics are immediately and permanently enjoined substantial and irreperable harm will be suffered by the plaintiffs and their members and patients who seek the services of the clinics.

Conclusions of Law

Jurisdiction & Venue

24. Plaintiffs allege violations of 42 U.S.C. § 1985(3). Therefore, this Court has jurisdiction of these claims pursuant to 28 U.S.C. §§ 1331, 1343. Plaintiffs also allege state causes of action. The Court has jurisdiction over these claims pursuant to the doctrine of pendent jurisdiction. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966).

25. Venue in the Eastern District of Virginia is proper under 28 U.S.C. § 1391(b).

Mootness

26. Defendants' plans for meetings, rallies and "rescue" demonstrations for November 10 through 12 and 18 through 20, 1989 were the impetus for this action. Those dates are now past and during those periods no clinic in Northern Virginia was the target of "rescue" demonstrations. These facts, defendants suggest, render this case moot. This suggestion is unpersuasive. The record reflects that defendants have organized, coordinated and

participated in "rescue" demonstrations for several years in many parts of the country, including Northern Virginia. This history coupled with the defendants' intense commitment to their anti-abortion goals points convincingly to the substantial likelihood that future "rescue" demonstrations will occur in the Washington Metropolitan area and elsewhere. Given this, the issues raised in this case are "capable of repetition, yet evading review" and, therefore, this case is not moot. *Murphy v. Hunt*, 455 U.S. 478 (1982); *see also, Powell v. McCormack*, 395 U.S. 486, 496 (1969) ("a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome"); *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225 (4th Cir. 1989) (same); *Virginia v. Califano*, 631 F.2d 324, 326 (4th Cir. 1980) (same).

Standing

27. Clinic plaintiffs have standing to seek injunctive relief on behalf of themselves, their employees, and their clients. *See Singleton v. Wulff*, 428 U.S. 106, 118 (1976) (relationship of physician to patient is sufficiently close to allow physician to assert privacy rights of patient); *Planned Parenthood Ass'n of Cincinnati v. City of Cincinnati*, 822 F.2d 1390, 1396 (6th Cir. 1987) (clinics that provide abortion services have standing to assert the rights of their patients, as these rights are " 'inextricably bound up' with the activity the . . . clinic desires to pursue.").

28. Organizational plaintiffs have standing to seek injunctive relief on behalf of their members. *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 6 (1988) (association has standing to sue on behalf of its members when those members would have standing to bring the same suit); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) (association has standing to bring suit on behalf of its members

when (i) members would otherwise have standing to sue in their own right, (ii) the interests it seeks to protect are germane to their organization's purpose and (iii) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit); *Village of Arlington Heights v. Metro Housing Dev. Corp.*, 429 U.S. 252, 260-61 (1977) (if plaintiff has "alleged such a personal stake in the outcome of the controversy as to warrant invocation of federal court jurisdiction" plaintiff has standing) (citations omitted). Thus, NOW has standing to sue on behalf of its members, who include women who may want to use abortion facilities in the Washington Metropolitan area.

29. Standing requires that a plaintiff allege personal injury fairly traceable to defendants' allegedly unlawful conduct and likely to be redressed by the requested relief. *Allen v. Wright*, 468 U.S. 737 (1984). Plaintiffs have met these requirements. The record amply demonstrates that unless defendants' threatened and unlawful "rescue" efforts are immediately and permanently enjoined, plaintiffs, their members and patients, may suffer irreparable harm.

Causes of Action

30. Plaintiffs assert five causes of action. Two causes of action are federal claims pursuant to 42 U.S.C. § 1985 (3). The remaining causes of action are pendent state statutory and common law claims of (i) trespass, (ii) public nuisance and (iii) tortious interference with business.

A. *Conspiracy to Interfere with Plaintiffs' Right to Interstate Travel Pursuant to 42 U.S.C. § 1985(3)*

31. A cause of action under 42 U.S.C. § 1985(3) has four essential elements:

(i) a conspiracy;

(ii) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;

(iii) an act in furtherance of the conspiracy;

(iv) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

Griffin v. Breckenridge, 403 U.S. 88, 102-3 (1971) (as explained in *United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 828-29 (1983).

32. "A conspiracy is a combination of two or more persons, by concerted action to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means." 3 E. Devitt & C. Blackmar, Federal Jury Practice & Instructions § 103.23 (1987); *see also* Model Penal Code § 5.03 (Proposed Official Draft 1962). Ample record evidence reflects the existence of a conspiracy among defendants. Specifically, it reflects that the individual defendants combined with each other and with defendant Operation Rescue to plan, organize, coordinate and carry out "rescue" demonstrations that involved unlawful means, including violation of trespass and nuisance laws and Section 1985(3).

33. The Fourth Circuit has characterized the statute's "purpose" element as requiring that the conspiracy be "motivated by a specific class-based, invidiously discriminatory animus." *Buschi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985); *see also, Bloch v. Mountain Mission School*, 846 F.2d 69 (4th Cir. 1988) (unpublished opinion).

34. Contrary to defendants' argument, gender-based animus satisfies the "purpose" element of Section 1985 (3). To meet the requirement of "class-based discriminatory animus," the class must possess "discrete, insular

and immutable characteristics comparable to those characterizing classes such as race, national origin and *sex*." *Buschi*, 775 F.2d at 1257 (4th Cir. 1985) (emphasis added) (denying § 1985(3) protection to a class designated as "whistleblowers") (quoting *Bellamy v. Mason's Stores, Inc.*, 368 F.Supp. 1025, 1028 (W.D. Va. 1973), *aff'd*, 508 F.2d 504 (4th Cir. 1974). Plaintiffs' members and patients constitute a subset of a gender-based class meeting these requirements. There is, to be sure, a lack of uniformity among courts on this issue. *See e.g., Roe v. Abortion Abolition Soc'y*, 811 F.2d 931 (5th Cir.) (holding that patients, doctors, and abortion clinics and their staffs do not form a protected class under § 1985(3)), *cert. denied* 484 U.S. 848 (1987); *National Abortion Fed. v. Operation Rescue*, 721 F.Supp. 1168 (C.D.Ca. 1989) (same). But, the majority of courts have concluded that a gender-based animus satisfies the conspiracy requirement of § 1985(3). *See Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988) ("§ 1985(3) extends . . . to conspiracies to discriminate against persons based on sex."); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 712 F.Supp. 165, 169 (D.Or. 1989) (§ 1985 (3) covers women seeking abortions); *Roe v. Operation Rescue*, 710 F.Supp. 577, 581 (E.D.Pa. 1989) (same); *New York State Nat'l Organization for Women v. Terry*, 704 F.Supp. 1247 (S.D.N.Y. 1989) (same); *Hunt v. Weatherbee*, 626 F.Supp. 1097 (D.Mass. 1986) (sex discrimination covered by § 1985(3)); *Skadegaard v. Farrell*, 578 F.Supp. 1209 (D.N.J. 1984) (same); *see generally* Annot. *Applicability of 42 U.S.C. § 1985(3) to Sex-Based Discrimination*, 46 A.L.R.Fed. 342 (1980). Thus, this Court concludes that a conspiracy to deprive women seeking abortions of their rights guaranteed by law is actionable under Section 1985(3).

35. Defendants engaged in this conspiracy for the purpose, either directly or indirectly, of depriving women seeking abortions and related medical and counselling

services, of the right to travel. The right to travel includes the right to unobstructed interstate travel to obtain an abortion and other medical services. *Doe v. Bolton*, 410 U.S. 179 (1973) (in-state residence requirement as requisite to abortion service violates right to travel). Testimony at trial establishes that clinics in Northern Virginia provide medical services to plaintiffs' members and patients who travel from out of state. Defendants' activities interfere with these person's right to unimpeded interstate travel by blocking their access to abortion clinics. And, the Court is not persuaded that clinic closings affect only intra-state travel, from the street to the doors of the clinics. Were the Court to hold otherwise, interference with the right to travel could occur only at state borders. This conspiracy, therefore, effectively deprives organizational plaintiffs' non-Virginia members of their right to interstate travel.

36. Since the right to interstate travel is protected from purely private as well as governmental interference, plaintiffs need not show state action to make out a claim under Section 1985(3). *Griffin v. Breckenridge*, 403 U.S. 88, 105-106 (1971); *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1360 (2d Cir. 1989).

37. The record demonstrates that the overt act requirement of the Section 1985(3) conspiracy is met here. Defendants' history of obstructionist activity, continued "rescue" training sessions, and recent violations of temporary restraining orders preventing "rescue" behavior plainly satisfy the statute's overt act requirement. *See New York State Nat'l Org. for Women*, 704 F.Supp. at 1260 (facts evidencing demonstrations aimed at preventing women from obtaining abortions satisfy the overt act requirement).

38. While the clinics are closed, patients are unable to receive medical treatment. Medical emergencies could arise in connection with abortions that would require immediate medical attention. Thus, clinic closings pose a serious threat of harm to women who are undergoing, or have undergone, abortions. Thus, defendants' continued threat to plaintiffs' exercise of their federally guaranteed right to travel satisfies the Section 1985(3) injury element. *New York State Nat'l Org. for Women*, 704 F.Supp. at 1260. Defendants' conduct clearly evidences an intent to continue this conduct.

39. Plaintiffs have, therefore, clearly established all of the elements of a violation of Section 1985(3) and as such, are entitled to relief.

B. *Conspiracy to Interfere with Plaintiffs' Privacy Rights Pursuant to 42 U.S.C. 1985(3)*

40. Plaintiffs' also seek relief on the ground that defendants' rescue demonstrations violate Section 1985(3) because they infringe on the fundamental right of plaintiffs' members and patients to obtain an abortion. Recognizing the likely absence of state action on these facts,[11]

[11] Where the claimed abortion right is a penumbral privacy right emanating from the First Amendment, state action must be shown to support a claim under Section 1985(3). *See New York State Nat'l Org. for Women*, 886 F.2d 1339, 1358 (2d Cir. 1989) ("[w]hen the asserted constitutional deprivation is based upon a right guaranteed against government interference . . . plaintiffs must demonstrate some state action."); *see also United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 833 (1983) (same). There is some authority, however, that the state action requirement is satisfied when "rescuers" refuse to notify the police of their next "rescue" target, thereby rendering police officials incapable of securing equal access to medical treatment for women who choose abortion. *New York State Nat'l Org. for Women*, 704 F. Supp. at 1260; *see also Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 384 (1979) ("[i]f private persons take conspiratorial action that prevents or hinders the constituted authorities of any state from giving or securing equal treatment, the private persons would cause those authorities to violate the 14th Amendment"). But plaintiffs did not argue this point and for the reasons noted in the text, *infra*, the Court need not reach the merits of this doubtful argument.

plaintiffs argue, with some lack of clarity, that the putative right to an abortion is of such a fundamental character as to be guaranteed against all interference, not just governmental interference.[12] Such a claim is problematic, both because it is novel and because *Webster v. Reproductive Health Serv.*, 109 S.Ct. 3040 (1989) suggests that the law concerning a putative abortion right is in a state of flux.[13] Given this and given that there is another inde-

[12] Though plaintiffs did not specify the source of such a fundamental privacy right, they may have meant the Ninth Amendment, for it was referred to in Justice Goldberg's concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and mentioned by Justice Blackmun in *Roe v. Wade*, 410 U.S. 113 (1973). Some commentators, too, have advocated that amendment as the source of an unenumerated right to privacy. *See* Redlich, *The Ninth Amendment as a Constitutional Prison*, 12 Harv. J.L. & Pub. Pol'y 23 (1989). But at least one commentator has sharply criticized the whole notion of grounding any right to an abortion in a fundamental constitutional privacy right. *See* BeVier, *What Privacy is Not*, 12 Harv. J.L. & Pub. Pol'y 99 (1989).

[13] Although the Court noted that the facts of *Webster* did not present an appropriate occasion to overturn *Roe*, its decision left *Roe* ripe for attack. *See, Webster v. Reproductive Health Serv.*, 109 S.Ct. 3040, 3048 (1989). Justice Rehnquist, speaking for the Court in *Webster*, explained, "*[s]tare decisis* is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes. We have not refrained from reconsideration of a prior construction of the Constitution that has proved 'unsound in principle and unworkable in practice.' *We think the Roe trimester framework falls into that category . . . Since the bounds [of Roe] are essentially indeterminate, the result has been a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine.*" *Webster*, 109 S.Ct. at 3056-57 (citations omitted) (emphasis added). For additional examples of the narrowing of *Roe see, Simopoulos v. Virginia*, 462 U.S. 506 (1983) (upholding a state statutory requirement that second trimester abortions be performed only in licensed clinics); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 402 U.S. 416 (1983) (women's fundamental right to abortion is not unqualified and must be balanced against important state interests); *Harris v. McRae*, 448 U.S. 297

pendent basis for relief under Section 1985(3), the Court concludes that it is unnecessary and imprudent to venture into this thicket. Courts should avoid constitutional questions where other grounds are available and dispositive of the issues presented. *See Hurd v. Hodge*, 334 U.S. 24 (1948); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 571 (1947); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). Therefore, the Court expresses no view as to the merits of plaintiffs' claim premised on a fundamental right to an abortion.

C. *Trespass*

41. It is unlawful in Virginia, (i) to enter or remain on the property of another after having been forbidden to do so, (ii) to instigate or encourage others to enter or remain on the property of another knowing that such persons have been forbidden to do so, and (iii) to enter the property of another for the purpose of damaging such property or interfering with the rights of the owner, user or occupant of such property. Virginia Code Ann. §§ 18.2-119, *et seq.* (Repl.Vol. 1988).

42. The undisputed record discloses that defendants (i) entered and remained on the property of some of plaintiffs after having been forbidden to do so, (ii) instigated and encouraged others to enter and remain on that property knowing that such persons have been forbidden to do so, and (iii) entered that property for the purpose, at least, of interfering with the rights of the owners to conduct their business and of the users to obtain medical and counselling services. Indeed, these actions are vital to defendants' avowed purposes and goals.

(1980) (upholding governmental regulations withholding public funds for non-therapeutic abortions); *Beal v. Doe*, 432 U.S. 454 (1977) (Social Security Act does not require funding non-therapeutic abortions as a condition of participating in state medicare program).

43. It is well established that these trespass statutes prohibit the conduct at issue here. *Northern Virginia Women's Medical Center v. Balch*, 617 F.2d 1045, 1049 (4th Cir. 1980) (abortion clinic's action against demonstrators based on violations of trespass statutes). And, evidence adduced at trial clearly establishes defendants' violations of the statutes in the past and the likelihood, unless enjoined, that such violations will occur in the future. Plaintiffs are, therefore, entitled to relief.

D. *Public Nuisance*

44. The common law of Virginia recognizes public nuisance as an offense. *Tisdale v. Virginia*, 114 Va. 866, 77 S.E. 482 (1913). A public nuisance is an act or condition that unlawfully operates to injure an indefinite number of persons. *United States v. County Bd. of Arlington Cty.*, 487 F.Supp. 137 (E.D. Va. 1979); *Ritholz v. Virginia*, 184 Va. 339, 35 S.E.2d 210, 214 (1945) ("any act, omission or use of property that is of itself hurtful to health, tranquility or morals or outrages the decency of a community is a nuisance"). Injury can include affecting the safety, health or morals of the public, or working a substantial annoyance, inconvenience or injury to the public in general. *County Bd. of Arlington Cty.*, 487 F.Supp. at 143. Individuals can sue to abate even if the public at large sustains injury from a public nuisance. *Harris v. Poulton*, 99 W.Va. 20, 127 S.E. 647 (1925).

45. In the absence of legislation, it is the province and duty of the courts to determine the existence of a public nuisance. *Stickley v. Givens*, 176 Va. 548, 11 S.E.2d 631 (1940). Once a court determines that a public nuisance exists, it may enjoin the nuisance in order to "restrain irreparable mischief, suppress oppressive litigation, or prevent a multiplicity of suits." *Switzer v. McCulloch*, 76 Va. 777 (1882); *see also, Ritholz v. Virginia*, 184 Va. 339, 35 S.E.2d 210 (1945); *Mears v. Colonial Beach*, 166

Va. 278, 184 S.E. 175 (1936). Of course, as with equitable remedies in general, a court ought not to enjoin a nuisance, except where there is no adequate remedy at law, or where there is a likelihood of irreparable injury. *Genheimer v. Crystal Spring Land Co.*, 155 Va. 134, 154 S.E. 489 (1930); *Talley v. Tyree*, 41 Va. (2 Rob.) 500 (1843); *Wingfield v. Crenshaw*, 3 Hen. & M. (13 Va.) 245 (1809). The undisputed record discloses that by trespassing on to a clinic's property for the purpose of blocking ingress into and egress from the property, and by hindering use of the parking lots and adjacent streets defendants' "rescue" demonstrations have created a public nuisance. *See, New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1362 (2d Cir. 1989). Accordingly, it is conduct that this Court may properly enjoin.

E. *Tortious Interference with Business Relationships*

46. The Court, having found a cause of action for injunctive relief under the state claims of trespass and public nuisance, need not reach the merits of this claim. Moreover, plaintiffs have not alleged facts sufficient to establish the elements of this cause of action. The elements of an action for tortious interference with contract rights include:

> (i) the existence of a valid contractual relationship or business expectancy;
>
> (ii) knowledge of the relationship or expectancy on the part of the interfering party;
>
> (iii) intentional interference inducing or causing a breach of the relationship or expectancy; and
>
> (iv) resultant damage to the party whose relationship or expectancy has been damaged.

Chaves v. Johnson, 230 Va. 112, 335 S.E.2d 97 (1985).

47. Because the record is unclear whether defendants knew of the existence of any contract between the clinics

and women seeking abortions and because relief is granted on the other state claims, this claim is dismissed without prejudice. Plaintiffs are not precluded, therefore, from alleging and proving facts sufficient to support this cause of action in any future proceeding.

Propriety of Injunctive Relief

48. As plaintiffs have prevailed on three of their claims, the issue of appropriate relief is presented. Plaintiffs seek a permanent injunction against defendants, and those acting in concert with them, from trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from, any facility that provides legal abortion services and related medical and psychological counseling throughout the country.[14] Plaintiffs also seek to enjoin defendants from conducting demonstrations, in the vicinity of clinics, that have the effect of harassing and intimidating plaintiffs' patients and members. For the reasons that follow, the Court concludes that plaintiffs are entitled to a carefully tailored injunction, but that the precise relief requested is overbroad.

49. Permanent injunctive relief is appropriate where (i) there is no adequate remedy at law, (ii) the balance of the equities favors the moving party, and (iii) the public interest is served. *See New York State Nat'l Org. of Women*, 704 F.Supp. at 1262; *Southern Packaging & Storage Co., Inc. v. United States*, 588 F.Supp. 532, 544 (D.S.C. 1984); *Nissan Motor Corp. v. Maryland Shipbuiding & Drydock Co.*, 544 F.Supp. 1104, 1122 (D.Md.), *aff'd* 742 F.2d 1449 (4th Cir. 1984); *LaDuke v. Nelson*, 560 F.Supp. 158, 162 (E.D. Wash. 1982); *see also, Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co.*, 550 F.2d 189, 195 (4th Cir. 1977). These requirements are met. Moreover, it is settled that "[p]erhaps

[14] Plaintiffs also seek damages under Section 1985(3). But plaintiffs offered no evidence as to the existence or amount of damage suffered. Accordingly, the Court does not award damages.

the most significant single component in the judicial decision whether to exercise equity jurisdiction and grant permanent injunctive relief is the court's discretion." 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2942 (1973), at 365. And it is the Court's view, in the exercise of its equity power, that this is an appropriate case for injunctive relief.

50. Plaintiffs have no adequate remedy at law. There is no adequate compensation in money damages that can remedy the damage from defendants' interference with plaintiffs' right to travel. Trial testimony amply supports the conclusion that women seeking abortions and counselling at abortion clinics are likely to suffer irreparable physical and emotional damage as a result of defendants' blockading of abortion facilities. Nor is the police enforcement of existing trespass statutes an adequate remedy. The inability of police officers to ensure access to clinics when confronted by defendants' "rescue" blockades warrants granting the additional injunctive remedy. *See New York State Nat'l Org. of Women*, 704 F.Supp. at 1262.

51. The Court concludes that the balance of the equities weighs decisively in plaintiffs' favor. Plaintiffs' activities, while morally objectionable to defendants, are nevertheless lawful. Defendants' "rescue" blockades are not lawful, as they involve violation of plaintiffs' rights under Section 1985(3), and under the Virginia law of trespass and nuisance.[15] The Court further concludes that the public interest is served by the issuance of a permanent injunction guaranteeing the public protection of the constitutional right to travel. Defendants' "rescue" demonstrations pose a significant and continuing threat to plaintiffs' right to travel. The lengthy and persistent

[15] This is not a case where rights clash and where resolution requires a balancing of or choosing between rights. Instead, this is a case where defendants' blockading conduct is unlawful and unprotected and it is plaintiffs' rights that are in danger of infringement.

history of "rescue" demonstrations, coupled with the recent violations of court orders, lead inescapably to the conclusion that plaintiffs face an immediate and continuing threat to their rights. Thus, the Court concludes that permanent injunctive relief is appropriate in the circumstances at bar. Specifically, the Court has ordered that,

> (1) The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys, and any persons acting in active concert or participation with it who receive actual notice of this Permanent Injunction, by personal service or otherwise, are ENJOINED and RESTRAINED from, in any manner or by any means, trespassing on, blockading, impeding or obstructing access to or egress from the following premises: Alexandria Women's Health Center, 101 South Whiting Street, Alexandria, Virginia; Commonwealth Women's Clinic, 916 West Broad Street, Falls Church, Virginia; Gynecare Associates, 312 South Washington Street, Alexandria, Virginia; Metro Medical Center, Inc. d/b/a Annandale Women's Center, 2871 Duke Street, Alexandria, Virginia; NOVA Women's Medical Center, 9900 Main Street, Suite 305, Fairfax, Virginia; Planned Parenthood of Metropolitan Washington, D.C., Inc., 5622 Columbia Pike, Suite 303, Falls Church, Virginia; Planned Parenthood of Metropolitan Washington, D.C., Inc., 10875 Main Street, Suite 208, Fairfax, Virginia; Prince William Women's Clinic, 9384-C Forestwood Lane, Manassas, Virginia.
>
> (2) The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys, and any persons acting in active concert or participation with it who receive actual notice of this Permanent Injunction, by personal service or otherwise, are ENJOINED and RESTRAINED from, in any manner, or by any means, trespassing on, blockading, impeding or obstructing

> access to or egress from any facility at which abortions, family planning or gynecological services are provided in Arlington County, Fairfax County, City of Fairfax, City of Falls Church, Loudoun County, Prince William County or the City of Alexandria.

52. Plaintiffs' request for nationwide injunctive relief is overbroad. Even assuming, *arguendo*, that plaintiffs have shown a need for such expansive relief, the practical problems of enforcement for violations in far-off locations, coupled with the variation in state laws and enforcement capability, militate convincingly against granting such relief. Moreover, it appears that courts in other jurisdictions have already issued injunctive relief in the face of "rescue" demonstrations. Violations of those orders are properly resolved in the issuing courts and there is no need for an additional layer of injunctive relief.

53. Plaintiffs' request is also overbroad in seeking to enjoin those "rescue" activities that tend to intimidate, harass or disturb patients or potential patients of the clinics. Defendants have a significant First Amendment right to express their view on the vitally important issue of abortion and nothing in the permanent injunction should be construed to limit that right. Defendants' First Amendment right to express their views cannot be curtailed or limited because some persons are timid or reluctant to hear expressions of defendants' views on the issue of abortion.[16] Thus injunctive relief must not abridge de-

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[16] Indeed, the First Amendment concept of a "free marketplace of ideas," taken seriously, necessarily entails that a citizen of a democracy has a duty to listen open-mindedly to opposing views on vital issues. It was distressing, therefore, to hear one of NOW's supporters testify at trial that he declined an invitation to engage in a discussion on the merits of the abortion issue with one of the defendants. Yet it is precisely this type of discussion between persons with opposing views that is contemplated by the First Amendment and is necessary as a first step in reaching a societal accommodation on this issue.

fendants' First Amendment rights to express their abortion views in an appropriate manner in the vicinity of abortion clinics. At the same time, however, the defendants may not use the First Amendment as an excuse to engage in unlawful conduct or to infringe a person's right of access to an abortion clinic. "Rescue" blockades that involve trespass, denial of access to the clinics, and defacement or damage to clinic property cannot be shielded by the First Amendment.

54. Plaintiffs' request for injunctive relief is overbroad in yet another respect. Plaintiffs requested the Court to order defendant Operation Rescue to mail to its entire membership, in its newsletter or otherwise, notice of the permanent injunction and its terms. Because Operation Rescue claims nationwide membership and because the permanent injunctive relief ordered by the Court is limited to the Northern Virginia area, national mail notice, through a newsletter or otherwise, is unnecessary. Instead, the Court will require defendants, their members, servants, employees and attorneys or any persons acting in concert with them to give notice of the injunction and its terms to all persons who assemble to participate in "rescue" demonstrations or similar events organized or promoted by defendants in the Northern Virginia localities.[17] In connection with this requirement, the Court will also direct defendants to file with the Court and serve on plaintiffs' counsel an affidavit establishing that

[17] This requirement does not impermissibly infringe defendants' First Amendment rights. It does not unconstitutionally require defendants to associate with speech with which they may disagree. *Compare Pacific Gas & Elec. Co. v. Public Util. Comm'n of California*, 475 U.S. 1, 15 (1986) (holding unconstitutional Commission's requirement that utility company enclose third-party newsletters in utility's billing envelopes). In *Pacific Gas*, the enclosure requirement was the Commission's overbroad means of furthering the state's interest in dissemination of utility rate information; the requirement was not pursuant to a court's narrowly tailored injunction.

the required notice concerning this injunction was given and describing with particularity the manner in which notice was given.

55. Similarly, the Court also concludes that it is appropriate for the permanent injunction to give notice of the likely consequences of a violation of its terms. To this end, the permanent injunction includes the following provision:

> The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys or any persons acting in active concert or participation with it who receive actual notice of this Permanent Injunction by personal service or otherwise and who violate the provisions of this Permanent Injunction and are held in contempt of court, may be imprisoned and fined $1,500. The Court may impose greater or lesser fines in the event of aggravating, mitigating or extenuating circumstances.

56. Moreov[illegible]e circumstances may change, the Court provid[illegible] the permanent injunction will expire at 5:[illegible] July 31, 1990, unless the plaintiffs show good [illegible]ts extension.

Conclusion

57. Plaintiffs [illegible]n attorney's fees, pursuant to 42 U.S.C. § 1988. The purpose of Section 1988 is to "ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (citations omitted). A Court in a Section 1985 action may, therefore, in its discretion, "allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs," pursuant to Section 1988. *Hensley*, 461 U.S. at 424 (1983). "A plaintiff must be a 'prevailing plaintiff' to recover an attorney's fee" under this section. *Hensley*, 461 U.S. at

433 (footnote omitted). Plaintiffs typically are considered "prevailing parties" if "they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley*, 461 U.S. at 433 (citations omitted). In this case, the plaintiffs have substantially prevailed.

58. The amount of attorney's fees awarded is to be determined on the basis of the facts of each case. *Hensley*, 461 U.S. at 429. Accordingly, the Court has directed the parties to submit supplemental memoranda on the issue of the appropriate amount of attorney's fees, if any.

/s/ T. S. Ellis, III
T. S. Ellis, III
United States District Judge

Alexandria, Virginia
6 December 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 89-1558-A

NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Plaintiffs,

v.

OPERATION RESCUE, *et al.*,
Defendants.

ORDER

[Filed Feb. 13, 1990]

This matter first came before the Court on November 8, 1989 on plaintiffs'[1] motion for a Temporary Restraining Order ("TRO") enjoining defendants from, *inter alia*, physically impeding access to, and egress from, premises that offer and provide legal abortion services and related medical and psychological counselling. Plaintiffs moved for an expedited hearing on this matter. The Court heard oral argument on the TRO on November 8 and 9, 1989. Plaintiffs appeared by counsel. Defendants, having received active notice of the proceeding, as well as copies of plaintiffs' pleadings, also appeared by counsel. Defendants' counsel accepted service of plaintiffs' complaint and related papers. At the conclusion of the hearing, the Court made the requisite findings and issued the TRO.

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[1] Plaintiffs in this case are nine (9) clinics ("clinic plaintiffs") that, *inter alia*, provide abortions or abortion counseling and five (5) organizations ("organizational plaintiffs") that, *inter alia*, seek to establish and preserve women's right to obtain abortions.

Following the entry of the TRO, the Court, with the parties' consent, and pursuant to Rule 65(a)(2), Fed. R. Civ. P., ordered the trial of the action on the merits to be advanced and consolidated with the hearing on the application for a preliminary injunction. The consolidated and expedited merits trial was set for November 16, 1989. As scheduled, the merits trial of this action commenced on November 16, 1989, lasted two (2) days and ended on November 20, 1989. At the conclusion of the evidence and after argument of counsel, the Court issued its Findings of Fact and Conclusions of Law first from the bench and then in a Memorandum Opinion. *National Organization of Women, et al. v. Operation Rescue, et al.*, 726 F.Supp. 1483 (E.D.Va. 1989). Essentially, the Court found that defendants (i) conspired to interfere with plaintiffs' right to interstate travel in violation of 42 U.S.C. § 1985(3); (ii) trespassed on plaintiffs' property in violation of Virginia Code §§ 18.2-119, *et seq.* (Repl. Vol. 1988); and (iii) committed a public nuisance in violation of the common law of Virginia. *Id.* A permanent injunction issued. The Court took under advisement the attorney's fees issue and gave the parties an opportunity to submit supplemental memoranda and other appropriate material on the matter. Both parties made submissions to the Court. Accordingly, this Order sets forth the Court's ruling on the attorney's fees in this case.

Well settled principles govern the award of attorney's fees in civil rights cases. The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, provides that the court, "in its discretion, may allow the prevailing party [in a federal civil rights action] . . . a reasonable attorney's fee." 42 U.S.C. § 1988. "The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances. H.R. Rep. No. 94-1558, p. 1 (1976). Accordingly, a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'"

Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) (citing S. Rep. No. 94-1011, p. 4 (1976), U.S. Code Cong. & Admin. News 1976, p. 5908); *see also, Spell v. McDaniel*, 852 F.2d 762 (4th Cir. 1988). It is, however, the "fee applicant [who] bears the burden of establishing by clear and convincing evidence the amount of a reasonable fee in the circumstances." *Equal Employment Opportunity Comm'n v. Nutri/System, Inc.*, 685 F.Supp. 568, 572 (E.D.Va. 1988). Of course, "'[m]athmatical precision is rarely achievable' when determining a reasonable fee award. Indeed, such precision would, in many instances, require a 'full scale second trial'—the result being that the attorney's fee issue would become the proverbial tail that wags the dog." *Spencer v. General Elec. Co.*, 706 F.Supp. 1234, 1237 n. 28 (E.D.Va. 1989) (citations omitted).

Given these principles, the starting point for ascertaining a reasonable fee is the calculation of the "lodestar figure." *Hensley*, 461 U.S. at 434. This figure is the product of two factors: (i) the number of hours spent on legal tasks and (ii) the appropriate hourly rate for legal services. *Id.* Fee applicants must furnish specific support for both factors. *Hensley*, 461 U.S. at 433, *see also, Blum v. Stenson*, 465 U.S. 886, 895-96 (1984) (applicants must furnish specific support for hourly rate proposed); *Nutri/System*, 685 F.Supp. at 573 (applicants must furnish specific support for hours spent). "Typically, a reasonable hourly rate is established by affidavits from lawyers with first-hand knowledge of the prevailing community rate in comparable cases for counsel with similar qualifications." *Id.* (citations omitted).

After the figure is calculated, it may be appropriate to increase or decrease the figure on the basis of one, or more, of the following factors:

(1) the time and labor expended;

(2) the novelty and difficulty of the questions raised;

(3) the skill required to properly perform the legal services rendered;

(4) the attorney's opportunity costs in pressing the instant litigation;

(5) the customary fee for like work;

(6) the attorney's expectations at the outset of the litigation;

(7) the time limitations imposed by the client or circumstances;

(8) the amount in controversy and the results obtained;

(9) the experience, reputation and ability of the attorney;

(10) the undesirability of the case within the legal community in which the suit arose;

(11) attorneys' fees awards in similar cases, *Nutri/System, Inc.*, 685 F.Supp. at 574 (footnote omitted).

With these principles in mind, the Court can analyze the fee application made by counsel for plaintiffs, the prevailing party in this case.

Plaintiffs' fee application, submitted by local counsel, Covington & Burling, consists of an unsworn twelve page pleading to which are attached declarations of Pamela S. Passman, a Covington & Burling lawyer, and Alison Wetherfield, a NOW Legal Defense Fund lawyer who resides in New York. The total fee claimed is $71,535.25. This amount is alleged to represent approximately 437 hours of legal work, performed by both local and New York counsel, billed at rates varying from $65 to $300 per hour. The total disbursements claimed are $2,276.55.

Close scrutiny of plaintiffs' claim for fees and costs compels the conclusion that it is manifestly excessive. This was not a complicated case. It was, essentially, a simple trespass action only modestly complicated by an

unsettled § 1985(3) issue.[2] Thus, the time billed for legal work in connection with this matter, as well as the rates at which it was billed, is out of proportion to the scale and nature of the case. Moreover, the application fails to meet the requisite documentation standards. As this Order reflects, plaintiffs' counsel overstaffed, overworked, overbilled, and underdocumented this case. These deficiencies are examined in greater detail in the following paragraphs.

I. *Local Counsel's Application*

A. Attorneys' Fees

Local counsel's documentation in support of its fee application displays, in chart form, the hourly rates of the army of lawyers/paralegals who worked on this matter and general statements of the time each individual spent on various legal tasks. The information is presented in eight categories, each representing a different stage of the litigation: (1) preliminary matters; (2) initial pleadings; (3) TRO hearing; (4) amended complaint; (5) trial brief and preparation for trial; (6) permanent injunction trial; (7) post trial matters; and (8) application for attorneys' fees. The application indicates that the total time declared for stages 1 and 2, *i.e.* "Preliminary Matters" and "Initial Pleadings," was calculated by dividing by three the total time spent on those matters to account for the fact that plaintiffs were also litigating the same issues in federal courts in Maryland and the District of Columbia. Thus, plaintiffs' fee application apportions one-third of the charges at those stages to the Virginia litigation. This practice does not meet the requirement that fee claimants "submit docu-

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[2] That issue was whether plaintiffs' members and patients constitute a subset of a gender-based class meeting the "class based discriminatory animus" requirement of a § 1985(3) cause of action. Also raised, but not reached by the Court, was whether defendants' conspiracy interfered with or violated plaintiffs' putative First Amendment privacy right to obtain an abortion.

mentation that reflects reliable *contemporaneous recordation* of time spent on legal tasks that are described with *reasonable particularity*." *Nutri/System*, 685 F.Supp. at 573 (emphasis added). The instant suit was commenced after the District of Columbia litigation and before the Maryland litigation. At best then, the division of fees and costs into thirds for these stages is a rough approximation that fails to meet the contemporaneous recordation standards. The three suits, although similar in many respects, were not identical. Because different jurisdictions were involved, the suits were in some measure factually and legally distinct. In any event, no reason appears why counsel could not have maintained separate time records for the tasks peculiar to each lawsuit, while noting specifically the time devoted to tasks common to all three suits. Since the tasks pertaining specifically to the Virginia litigation for these stages are not recorded with particularity, the Court is unable to "weigh the hours claimed against [its] own knowledge, experience, and expertise of the time required to complete similar activities." *Nutri-System*, 685 F.Supp. at 573 (quoting *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974)). No doubt some reasonable period of time during these stages is attributable to the Virginia litigation, but "[i]nadequate documentation is a basis for reducing or denying a fee award." *Nutri/System*, 685 F.Supp. at 573 (citing *Hensley*, 461 U.S. at 433.).

Even assuming that one-third of the total time spent is properly attributable to the Virginia litigation, the figures offered lead, inescapably, to the conclusion that the initial stages of this litigation were over staffed and consumed an inordinate amount of time. The fee application claims 16 hours for "preliminary matters" in the Virginia litigation. This means local counsel spent 48 hours of billable time, totalling $6,476.25, on "meetings with clients to discuss matter and strategy, legal research re: jurisdictional limitations on injunctions; fact gathering; Meetings/telephone calls with Covington & Burling Team ("C & B Team") and co-counsel." No portion of this time is attributed to preparation of the Complaint, for that time is subsequently recorded under "initial pleadings," nor was any time attributed to settlement negotiations with defendants. It is difficult to understand how so much time could reasonably be spent on the matters noted, especially since a large number of hours was also spent on research in stage 2.

For stage 2, the fee application claims 82.55 hours (one-third of 247.64 hours) for "initial pleadings." Of the 82.55 hours, the lion's share was billed by an attorney whose rate is $170 per hour. With one exception, this is the highest hourly rate charged by any attorney on the local counsel team. Yet not all the tasks listed under "initial pleadings" seem commensurate with this billing rate. They include "legal research and drafting pertaining to the complaint . . . affidavits, compile exhibits to memorandum . . . meetings and correspondence with clients concerning fact gathering . . . [and] filing of initial papers and coordinating service of process." Plaintiffs have not established facts through "affidavits from lawyers with first-hand knowledge of the prevailing community rate in comparable cases for counsel with similar qualifications," to justify this $170 per hour billing rate for these sorts of tasks. *Nutri/System*, 685 F.Supp. at 573. Plaintiffs reliance on a 1988 Price, Waterhouse salary survey does not satisfy this standard. This survey covers only the fifteen largest firms in the District of Columbia; it does not discuss the rate with respect to comparable cases, nor does it discuss with particularity counsel's qualifications. Further, although "[r]ecent fee awards in similar cases . . . may . . . be probative," plaintiffs have submitted no such information. Moreover, even accepting the rate charged, it is difficult to understand why these tasks required a total of 247.64 hours to complete.

The claim for time spent on the amended complaint (stage 4), $1,160.00, also appears excessive. The amended complaint in this case merely added the names of certain clinics; it required little substantive work. The fee application itself reflects the simple and routine nature of this work: "Draft and file amended complaint; discussions with clients and clinics interested in becoming Plaintiffs." Yet, of the 5 total hours claimed on the fee application for this task, 3 hours are claimed at the maximum rate that appears on this fee application, $300 per hour. Without documentation justifying this hourly rate for this task, the Court is left to question how prudent time management could dictate using the skills of a $300 per hour lawyer on a task so free from complexity. The Court does not doubt that this lawyer properly commands this hourly rate in appropriate complex litigations. In this instance, however, a lawyer with this level of expertise was unwarranted. Of course, a firm may wish to commit this lawyer to the task for other reasons, but in that event, it may not charge an hourly rate appropriate only in another context.

The 220 total hours spent at stage 5 ("Trial Brief and Preparation for Trial") and stage 6 ("Permanent Injunction Trial") also demonstrates over staffing and excessive use of attorney time. First, these two stages utilized the time of six attorneys and paralegals. It is unclear why a case of this modest complexity should require such a battalion of legal personnel. While it is true that plaintiffs' memorandum was well researched, well organized and well written, it is equally true that it should not have required as much lawyer time to prepare as it apparently did. In addition, many of the legal tasks described at stage 5 appear to be duplicated, without explanation, at stage 6. For example, both stages indicate time spent on "meeting and correspondence with clients concerning fact gathering"; "meetings/telephone calls with C&B Team and co-counsel to discuss legal issues and

strategy"; "prepar[ing] potential exhibits"; and "interview[ing]" or "prepar[ing]" potential witnesses. Given the description of the tasks performed during the hours claimed, there is no apparent justification for using 48 hours of a $300 per hour attorney's time and 36 hours of a $170 per hour attorney's time.

Perhaps the plainest example of excessive lawyer time is the 41 hours claimed for the fee application, which consists chiefly of a chart describing the time spent on various tasks, multiplied by hourly rates, to yield a total dollar amount of fees charged. For this, plaintiffs claim $5,837.50 in attorneys' fees.[3] This amount represents a surprising 9% of the total fees claimed. There is no readily apparent justification for the number of hours devoted to this task. The law regarding award of attorneys' fees is well established and straightforward. A half hour's library search would have turned up the *Hensley*, *Spell*, *Johnson*, and *Nutri/System* decisions and others as well. Research, then, should not have consumed much time. Moreover, if billable time was recorded contemporaneously, compilation of the documentation for the fee application should also have been straightforward and not particularly time consuming. It is, therefore, puzzling that the fee application required six attorneys and paralegals to devote 41 hours to its preparation.

Examination of the fee application as a whole reflects that for virtually every documented task, the lodestar figure is excessive with respect to both its variables; the number of hours spent on each task is excessive and the rate at which those hours were billed is, in some instances,

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[3] Counsel's figure, based on the time billed and hourly rates claimed, is actually incorrect. Counsel indicates that Karen Christiansen claimed 3 billable hours, at a rate of $65 per hour, for time spent on the application for attorneys' fees. The total fee claimed for her time is listed as $56.00. 3 hours at a rate of $65 per hour should yield a fee of $195.00. Thus, the Grand Total for counsel's fee application charges should be $5,967.50, not $5,837.50.

too high for the type of work involved. Beyond this, the supporting documentation is inadequate. The descriptions are excessively vague; they do not adequately detail the work performed. "[I]t is 'insufficient to provide the District Court with very broad summaries of work done and hours logged.'" *Nutri/System*, 685 F.Supp. at 574 (quoting *National Ass'n of Concerned Veterans*, 675 F.2d 1319, 1327 (D.C. Cir. 1982)). Further, task descriptions are duplicated from stage to stage without any indication of how they are different tasks and, therefore, properly billable more than once. It is incumbent on the fee applicant to "make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." *Hensley*, 461 U.S. at 434. Without more specific documentation, the Court cannot ascertain that this has been done.

In summary, local counsel's lodestar figure is inadequately supported. In these circumstances, "courts have exercised their discretion to cut the proposed figure by a fixed percentage or amount based on the judge's overall familiarity with the case. *See, e.g., Uzzell v. Friday*, 618 F.Supp. 1222, 1226, 1229 (M.D.N.C. 1985) (fees reduced 25% for attorneys and 35% for paralegals as a result of inadequate documentation)." *Nutri/System*, 685 F.Supp. at 576. Given all the facts and circumstances of this case, the Court concludes that the proposed lodestar figure should be $22,500.00. The Court arrived at this figure based on the Court's "overall familiarity with the case, its complexity, and the counsel involved." *Nutri/System* at 576. Specifically, the Court multiplied 150 billable hours by an average hourly rate of $150. This hourly rate is reasonable for the work performed in this case; it roughly averages the higher billing rates of partners with the lower rates of associates and paralegals.[4] The total time

[4] It is understandable that some lawyers in local counsel's firm would bill at a higher rate than others. But the Court is aware of many lawyers in the Northern Virginia area, in small firms or as sole practitioners, who could have tried this case competently for $150 per hour. This, too, supports the reasonableness of this hourly rate.

of 150 hours is a reasonable amount of time to prepare and try this matter, especially given the fact that the case progressed briskly from filing to disposition in less than two weeks. No time was needed for discovery. In the Court's view, the following estimates support the reasonableness of the 150 hour figure: 50 hours of research and brief preparation; 30 hours of witness preparation; 20 hours of trial preparation; 20 hours of trial hearings; and 30 hours of miscellaneous post-trial tasks. An award of $22,500.00, the Court believes, fairly accounts for the inadequate documentation and also appropriately accommodates the factors set forth in *Spell*. *See, supra* at 4. Accordingly, the Court awards plaintiffs' $22,500.00 in attorneys' fees for representation by local counsel.

B. Expenses

In addition to attorneys' fees, a "prevailing plaintiff in a civil rights action is entitled . . . to recover 'those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services.'" *Spell*, 852 F.2d at 771 (quoting *Northcross v. Board of Educ. of Memphis City Schools*, 611 F.2d 624, 639 (6th Cir. 1979). The Court must examine costs, as it examines fees, to determine their reasonableness. Meticulous documentation is therefore necessary to afford the Court meaningful review of a claim for costs. In this case, the documentation submitted is deficient. Counsel indicates that its $1,877.70 claim for disbursements was calculated by the same method as its attorneys' fees for stages 1 and 2 of the litigation, *viz.*, by dividing the total amount of disbursements in all three suits by three. This method of calculation is not acceptable; while there may have been some common costs, there were doubtless many costs that were specific

to the Virginia litigation. The disbursements claimed include, *inter alia*, "transportation, messengers, telephone/fax, mail." In some degree, the cost of these services is determined by specific distances traveled. Thus, the transportation, messenger, telephone/fax and mail costs of the Virginia litigation are unlikely to be the same as the transportation costs attributable to the Maryland or District of Columbia suits. Counsel's calculation of disbursements in this manner suggests to the Court that counsel failed to keep accurate records of the disbursements actually incurred with respect to the Virginia litigation. Plaintiffs, therefore, have failed to meet their burden of establishing by clear and convincing evidence the amount of a reasonable cost in the circumstances. *See Nutri/System*, 685 F.Supp. at 572. Accordingly, the Court awards plaintiffs only those costs that are specifically identifiable, namely the costs for transcripts and filing fees, which total $1,107.00.

II. *New York Counsel's Application*

A. Attorneys' Fees

In some respects, New York counsel's fee application suffers from the same flaws that compelled the Court to reduce the fees and costs claimed by local counsel. For example, it presumes, in calculating "phase 1" hours, that dividing by three the total number of hours spent on the three suits is an acceptable method of calculating the number of billable hours for purposes of the lodestar figure. As noted, this methodology falls short of the documentation requirements of fee awards. Moreover, the fee application claims fees during "phase 1" for legal work performed outside the scope of the Virginia litigation. In particular, the application claims fees for 2.1 hours of "preparation for argument in D.C." and 8.0 hours of activities in connection with the "D.D.C. court appearance," including "meeting with D.C. police counsel and preparation with police witnesses." These hours, while

perhaps compensable under another court's jurisdiction, are not compensable by an award of this Court for attorneys' fees. The 26.6 hours claimed for "phase 2" are designated as pertaining only to the Virginia litigation. Those hours, in contrast to the hours in "phase 1," are documented with commendable particularity. Further, the time claimed for each task seems reasonable.[5]

The hourly rate variable of the lodestar figure, however, is not supported. As noted above, there has been no justification for the rates charged in this case. The Court, therefore, will allow New York counsel the same hourly rate, $150, as allowed local counsel.

Accordingly, the Court concludes that the proposed lodestart figure for New York counsel should be $3990.00, representing 26.6 hours billed at an hourly rate of $150.

B. Expenses

New York Counsel's fee application claims $398.85 in expenses in connection with this case. The Court concludes that only $180.55 is reasonable. Applying the same principles applied throughout the Court's evaluation of this fee application, the Court finds all of the "phase 1" expenses unreasonable as they are expenses incurred in connection with the trio of suits and not specifically attributable to the Virginia litigation. With respect to the "phase 2" expenses, however, the Court reaches a different result. These expenses were incured solely in regard to the Virginia suit and appear reasonable.

Accordingly, the Court awards New York counsel $180.55 in expenses.

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[5] The 3.0 hours reasonably claimed in regard to the attorneys' fees application stands in sharp contrast to the 41 hours claimed by local counsel.

III. *Conclusion*

For the reasons stated above, the Court hereby ORDERS defendants to pay plaintiffs a total of $27,687.55 representing $26,490.00 in attorneys' fees and $1,287.55 in costs.

Nothing in this Order should be construed as critical of the quality of legal work performed by plaintiffs' counsel. The case was competently prepared and tried. This Order simply records (i) that the hours devoted to the case were excessive; (ii) that the hourly rates, in some instances, were too high; and (iii) that the fee claim was not properly documented.

/s/ T. S. Ellis, III
T. S. ELLIS, III
United States District Judge

Alexandria, Virginia
February 13, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Civil Action No. 89-1558-A

NATIONAL ORGANIZATION FOR WOMEN, *et al.*,
Plaintiffs,

v.

OPERATION RESCUE, *et al.*,
Defendants.

INJUNCTION

[Filed Sept. 21, 1990]

By Order dated November 22, 1989, this Court entered an Injunction that, *inter alia*, enjoined defendants and their agents from, in any manner or by any means, trespassing on, blockading, impeding or obstructing access to or egress from various facilities in the Northern Virginia area that provide abortion counselling and services. That injunction was once extended and is scheduled now to expire at 5:00 p.m., September 24, 1990, absent a showing of a continuing need for injunctive relief.[1]

Pursuant to the Court's November 22, 1989 Injunction Order, July 31, 1990 Injunction Order, and Local Rule 11(E), plaintiffs, on July 6, 1990, filed a motion for renewal of the injunction on which they continue to rely.

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[1] The United States Court of Appeals for the Fourth Circuit affirmed the injunction in all respects. *See National Organization for Women, et al. v. Operation Rescue, et al.*, No. 90-2606 (4th Cir. September 19, 1990).

In support of their Motion, plaintiffs argue that since the entry of the Injunction in November, 1989, the threat of defendants' illegal activities has not diminished and that defendants' "rescue" activities have continued unabated in the Washington Metropolitan area with promises of future "rescues," including a repeat "D.C. Project" rescue in November 1990. The evidence submitted by plaintiffs, particularly letters and deposition testimony, reveals blockading-type "rescue" activity in the Washington, DC metropolitan area during the past six months. Plaintiffs also introduced evidence that points persuasively to the conclusion that defendants intend similar activities in the area during the next few months.

In light of this evidence, the Court requested of defendants whether they could represent that future activity in violation of the injunction would not occur. Defendants stated that they could not make this representation.

On the record presented, the Court finds that plaintiffs have made an adequate showing of a continuing need for injunctive relief, thus warranting the extension of the injunction. Based on this, and in the absence of any representation by defendants that without the injunction no blockading activity will occur, the Court, in its discretion, GRANTS plaintiffs' Motion for an Extension of the Injunction. Accordingly, the Injunction's provisions are continued in full force and effect until *5:00 pm on Monday, September 24, 1991.*

The Court, therefore, ADJUDGES, ORDERS and DECREES that:

(1) The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys, and any persons acting in active concert or participation with it who receive actual notice of this Injunction, by personal service or otherwise, are ENJOINED and RESTRAINED from, in any manner

or by any means, trespassing on, blockading, impeding or obstructing access to or egress from the following premises: Alexandria Women's Health Center, 101 South Whiting Street, Alexandria, Virginia; Commonwealth Women's Clinic, 916 West Broad Street, Falls Church, Virginia; Gynecare Associates, 312 South Washington Street, Alexandria, Virginia; Metro Medical Center, Inc. d/b/a Annandale Women's Center, 2871 Duke Street, Alexandria, Virginia; NOVA Women's Medical Center, 9900 Main Street, Suite 305, Fairfax, Virginia; Planned Parenthood of Metropolitan Washington, D.C., Inc., 5622 Columbia Pike, Suite 303, Falls Church, Virginia; Planned Parenthood of Metropolitan Washington, D.C., Inc., 10875 Main Street, Suite 208, Fairfax, Virginia; Prince William Women's Clinic, 9384-C Forestwood Lane, Manassas, Virginia.

(2) The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys, and any persons acting in active concert or participation with it who receive actual notice of this Injunction, by personal service or otherwise, are ENJOINED and RESTRAINED from, in any manner or by any means, trespassing on, blockading, impeding or obstructing access to or egress from any facility at which abortions, family planning or gynecological services are provided in Arlington County, Fairfax County, City of Fairfax, City of Falls Church, Loudoun County, Prince William County or the City of Alexandria.

(3) The individual defendants, and defendant Operation Rescue, its officers, agents, members, servants, employees, and attorneys, and any persons acting in active concert with it are directed to inform all persons who assemble to participate in a "rescue" operation [2] or simi-

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[2] "Rescue operation," as used here, means any activity that trespasses on, blockades, impedes or obstructs access to or egress

lar event in concert with the defendants in the localities listed above in paragraph 2, of this Injunction and its terms. In the event of a "rescue" operation or similar event within the area covered by this Injunction, defendants are directed to file with the Court and serve upon the counsel for plaintiffs an affidavit establishing compliance with this paragraph and describing with particularity the means by which compliance was achieved. This affidavit is to be filed and served within three (3) days of the "rescue" operation or similar event.

(4) The individual defendants, and defendant Operation Rescue, its officers, agents, members, sevrants, employees, and attorneys or any persons acting in active concert or participation with it who receive actual notice of this Injunction by personal service or otherwise and who violate the provisions of this Permanent Injunctio and are held in contempt of court, may be imprisoned and fined $1,500. The Court may impose greater or lesser fines in the event of aggravating, mitigating or extenuating circumstances.

(5) This Injunction terminates at 5:00 p.m., September 24, 1991,[3] but may be extended for good cause shown.

(6) Plaintiffs are directed to deliver a copy of this Permanent Injunction to all of the police departments in each of the localities listed in paragraph 2.

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from facilities at which abortions, family planning counseling or gynecological services are provided. Similarly, Operation Rescue has defined "rescues" as "heroic attempts by God-fearing people to save babies and mothers from abortion on a *particular day*, by *peacefully*, but *physically* blockading abortion mills with their bodies, to intervene between abortionists and the innocent victims." Operation Rescue, National Day of Rescue—October 29, 1988 (emphasis in original).

[3] *See Surgidev Corp. v. Eye Tech., Inc.*, 648 F. Supp. 661, 696 (D. Minn. 1986) ("Normally, the duration of an injunction is designed to preclude defendant's wrongful activities for a period of time reasonably necessary to protect plaintiffs' interest . . . .").

Nothing in this Injunction should be construed to limit defendants' free exercise of their First Amendment rights. More specifically, nothing in this Injunction limits defendants' First Amendment right to express their views on abortion publicly and in a proper manner in the vicinity of any facility. But defendants may not use the First Amendment as an excuse to violate plaintiffs' rights.

The Clerk is directed to issue copies of this Injunction to all counsel of record.

/s/ T. S. Ellis, III
T. S. ELLIS, III
United States District Judge

Alexandria, Virginia
September 21, 1990